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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 275

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF MORTON SALT COMPANY

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF MORTON SALT COMPANY

Appellant Morton Salt Company (the corporate name of which was changed, on May 10, 1965, to "Morton International, Inc.", hereinafter referred to as "Morton") appeals from the Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division (hereinafter referred to as the "District Court"), stating that Morton and Diamond Crystal Salt Company (hereinafter referred to as "Diamond") "have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act". Morton submits this Jurisdictional Statement to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The District Court's order, dated January 25, 1963, granting the Government's motion to strike certain affirmative defenses raised by Morton, Diamond and International Salt Company (Appendix A hereto) is unreported.

The District Court's Memorandum Decision on the merits, dated August 6, 1964 (Appendix B hereto) is unreported.

The District Court's Findings of Fact and Conclusions of Law, filed on November 24, 1964 (Appendix C hereto) is unreported.

JURISDICTION

This action was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 909, 15 U.S.C. § 4, to enjoin an alleged violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. § 1.

The District Court's Final Judgment (Appendix D hereto) was entered on November 24, 1964. Its order amending that judgment (Appendix E hereto) and the Amended Final Judgment (Appendix F hereto) were dated and entered on February 19, 1965. Morton's Notice of Appeal was filed with the District Court on April 19, 1965.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Meat Drivers* v. *United States*, 371 U.S. 94.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of . . . property, without due process of law; . . . "

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal . . . "

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 909, 15 U.S.C. § 4, provides in pertinent part:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title . . ."

QUESTIONS PRESENTED

1. Does the evidence support the District Court's findings of conspiracy as regards identical bids to government agencies on de-icing rock salt, or did the District Court improperly predicate its decision on conscious parallelism in violation of the teachings of this Court in *Theatre Enterprises* v. *Paramount,* 346 U.S. 537?

2. Where the Government prosecutes a criminal antitrust suit which results in a jury verdict of not guilty, is the Government then barred from prosecuting a "civil" suit against the acquitted defendents involving the identical charge under the same statute (a) by the doctrine of *res judicata* (notwithstanding *United States* v. *Real Estate Boards,* 339 U.S. 485), or (b) by either the double jeopardy clause or the due process clause of the Fifth Amendment to the United States Constitution?

STATEMENT OF THE CASE

As part of this Statement, Morton will briefly set forth the history of the litigation, the nature of the evidence, and an analysis of the District Court's decision.

A. History of the Litigation.

This litigation commenced with the service upon Morton, Diamond and other respondents of a subpoena *duces tecum*, dated December 28, 1959, returnable to a federal grand jury sitting in Springfield, Illinois. Pursuant to that subpoena, Morton, Diamond and the other respondents produced many thousands of documents. After the Springfield grand jury heard the testimony of many witnesses during seven separate sessions, the Government abandoned that grand jury and shifted the investigation to a grand jury attached to the United States District Court for the District of Minnesota.

The St. Paul grand jury heard salt industry witnesses on four different sessions, and on June 28, 1961 returned an indictment against Morton, Diamond, International Salt Company (hereinafter referred to as "International") and Carey Salt Company, charging a violation of Section 1 of the Sherman Act.

Carey Salt Company's plea of *nolo contendere* was accepted by the District Court on March 26, 1962, and on the same date a consent decree was entered against that corporation in the instant case.

The criminal trial involving Morton, Diamond and International (hereinafter sometimes referred to collectively as the "defendants") commenced on May 2, 1962 and lasted for approximately five weeks. During the trial fifteen wit-

nesses testified for the Government and a total of thirteen witnesses testified for Morton, Diamond and International. On June 7, 1962, the jury returned a verdict of not guilty as to each of the three defendants.

The complaint in the instant case was filed on July 11, 1961, but all proceedings in the civil case were stayed by the District Court pending the termination of the criminal case. After the not guilty verdict in the criminal case, the instant case was reactivated with the filing of answers to the complaint by Morton, Diamond and International on June 28, 1962.

One of the important pre-trial rulings made by the District Court involved the Government's motion to strike the affirmative defenses in the answers filed by the defendants. Based on their acquittal in the criminal case, a case which involved a charge identical with the charge involved in the instant case, the defendants had raised the dual defense of *res judicata* and double jeopardy. The order of the District Court, dated January 25, 1963, striking *both* such defenses on the basis of this Court's *Real Estate Boards* decision is set forth as Appendix A hereto.

On November 4, 1963 the District Court entered a consent decree against International, thereby terminating the Government's injunction action against that corporation.

Also on November 4, 1963, the District Court entered an order approving a stipulation entered into by the parties which provided that the instant case be tried by the District Court on the record made in the companion criminal case, supplemented only by two interrogatories propounded by the Government and the answers of Morton and Diamond thereto. By virtue of that stipulation, the court below decided the case on the basis of the briefs submitted by the parties and the record in the criminal case but without

hearing the testimony of any witnesses. Since the District Court also adopted the evidentiary rulings made by the trial judge in the criminal case, the District Court considered only those facts which were presented to the jury which returned the not guilty verdict.

B. The Nature of the Evidence.

By virtue of certain rulings in the criminal case, the Government's case was ultimately dependent upon proof of collusive bidding to seventeen government agencies.[1] The violation that the Government attempted unsuccessfully to prove in the criminal case was a conspiracy to submit identical bids—with each "conspirator" thus taking its chances as to which company or companies would get the award—as distinguished from a conspiracy to "rotate" the low bids and thereby assure each member of the group a certain percentage of the awards. Thus, the Government placed primary reliance on proof of bid identity, such proof taking the form of bid tabulations and charts and also live testimony from seven purchasing agents to the effect that they were the "victims" of identical bids. None of the purchasing agents, however, did or could offer a scrap of evidence that such bidding was the result of collusion rather than competition.

The remainder of the Government's evidence consisted of an attempt to prove that, where the bids were identical, such

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1. (1) State of Minnesota, (2) City of Minneapolis, (3) City of St. Paul, (4) State of Wisconsin, (5) City of Milwaukee, (6) State of Illinois, (7) Illinois Toll Road, (8) City of Chicago, (9) Chicago Transit Authority, (10) State of Indiana, (11) Indiana Toll Road, (12) State of Michigan, (13) Wayne County, (14) City of Detroit, (15) State of Ohio, (16) Ohio Turnpike, and (17) City of Baltimore.

identity was not "attributable to chance or coincidence"[2] but was caused by something illegal. The "something" primarily emphasized by the Government was what it called the "restrictive pricing policies" of the defendants, i.e., policies whereby the bidders choose to "meet but not beat" the predicted low bid of their competitors. The method by which such policies were carried out was labeled by the Government as "formula pricing" which, according to the Government's description to the jury, consisted ". . . simply of taking the price of salt at the mine or the F.O.B. mine price, if you prefer, and adding to that the freight charges from the mine to the point of delivery." (Tr. p. 178). As will be shown under the following caption hereof, this combination of "restrictive price policy" and "formula pricing"— in the eyes of the Government — converted bid identity into bid collusion.

The defendants' evidence consisted of three basic categories: First, an explanation of the identity in defendants' bids; second, express denials of collusion; and third, a description of the aggressive competition waged by the defendants against each other and against the other salt companies—with Morton emerging as the most successful competitor in terms of the amount of business taken away from its rivals. The *policy* of "meeting but not beating" was not disputed by the defendants; on the contrary the evidence showed the distinct and valid reasons that each defendant had for the adoption of such a policy. The evidence also showed that each defendant, from legitimate

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2. See page 19 of the Government's initial "post-trial" brief in the instant case, hereinafter designated "(Gov't. brief p. . .)." (The Government's reply brief will be designated "(Gov't. reply brief p. . .)." The transcript of the trial in the criminal case (which, by virtue of the stipulation of the parties, constitutes the "trial" in the instant case) will be designated "(Tr. p. . .).")

means at its disposal, had the ability to predict with a considerable degree of accuracy the low bid which in most cases it would attempt to match. This ability to predict the low bid was not presented by the defendants as a theory but as an accomplished fact; for days at a time during the trial, witnesses explained the method by which their bids were arrived at, both those which were identical and those which were non-identical. The Government acknowledged before the jury at the end of the criminal case—in a statement which was incorporated in its reply brief in the instant case (p. 12)—that the defendants had demonstrated that their bid prices were arrived at independently:

> "Witnesses from each of these defendants testified for hours and days on how bids were computed.
>
> "These witnesses included Mr. Jordan of Diamond Crystal, Mr. Price of International, Mr. Rankin of Morton. These witnesses had one thing in common. *They knew all the answers on how bids were computed, but so far as collaboration on prices or bids was concerned, they were in the dark.*" (Tr. p. 3512; emphasis added)

The defendants' evidence of aggressive competition was varied and extensive. From Morton's standpoint, the results of this competitive behavior were dramatically revealed by the undisputed evidence as to the 40% *decrease* in International's share of the rock salt market in the space of only six years, and the *increase* in Morton's share of that market from 10% to 31% in approximately the same period of time. Standing alone, this uncontroverted evidence of the highly successful competition waged by Morton against its "co-conspirators" demolished the Government's theory that the conspiracy was one to "share the market" (Tr. p. 185) among the alleged conspirators.

C. The District Court's Decision.

The District Court's findings of fact stand in sharp contrast to the scope of the violation which the Government attempted to establish. The Government, both in its complaint and in its post-trial briefs, charged that the conspiracy (a) involved all types of rock salt, (b) involved private buyers as well as government agencies, and (c) was nationwide in its operation. The District Court's initial finding of fact—which expressly limits all of its subsequent findings—confines the case to (1) de-icing rock salt, (2) sold under sealed bids, (3) to "one or more" of sixteen specified government agencies. While the court below thus made it clear that its adjudication did not extend *beyond* the specified sixteen government agencies (the seventeen agencies involved in the criminal case (footnote 1 supra) less Baltimore), it is equally clear that the District Court made no finding that a conspiratorial bid was submitted to any particular one of the sixteen agencies. *Moreover, the court below never identified the co-conspirators with whom Morton was found to have conspired.*

Apart from its obvious reliance on the Government's statistics as to bid identity, the District Court did not disclose any reasons for reaching its decision. The Memorandum Decision consists almost entirely of (a) a description of the contentions of the Government and the defendants, (b) an acknowledgment that Morton and Diamond aggressively and successfully competed for rock salt business, and (c) a frank recognition that the behavior of the defendants "may seem inconsistent with the position of the Government with reference to the alleged understanding to avoid competition in the bid prices of rock salt." (App. A-10). In the few remaining sentences of the opinion, the District Court, in concluding that a violation had been established by a "fair preponderance of the evidence", makes reference

to "affirmative evidence" and "additional facts and circumstances" but nowhere identifies what such evidence, facts and circumstances consist of.

THE QUESTIONS ARE SUBSTANTIAL

I. Question No. 1

This appeal provides the first opportunity for this Court to address itself to the alleged economic evils of identical bidding. In *Theatre Enterprises*, in affirming the court of appeals and leaving undisturbed the jury's acquittal of the defendants, this Court held the practice of "conscious parallelism" to be legal in the setting of an alleged *non-price* conspiracy. Here the doctrine of conscious parallelism as reflected by identical bidding must be tested against the equally formidable doctrine that holds a *price* conspiracy to be a *per se* offense under Section 1 of the Sherman Act. Can the two doctrines exist side by side or must one yield to the other? Until that question is answered, the American businessman will be unable to price his product in accordance with the dictates of the marketplace, where the market demands price identity, without fear of having his conduct characterized as being in conflict with the *public interest* as the latter is embodied in this nation's principal antitrust statute.

The importance of the identical bidding issue—in terms of national antitrust enforcement—is apparent from the extensive reporting program undertaken by the Federal Government. Under the requirements of this program, inaugurated in 1961 by Executive Order 10936, all agencies of the Federal Government are *required* (and all State and local agencies are *urged*) to report to the Department of Justice detailed information relating to identical bids submitted to that agency, and the Attorney General, in turn, is required to issue reports to the President from time to

time showing the results of the program. The first such printed report, including a lengthy treatise on "The Nature of Identical Bidding and Its Principal Causes", was issued by the Attorney General in July, 1962. The second report, 401 pages in length, was issued in July, 1964, and the third massive report, analyzing thousands of identical bid situations, was published earlier this year.

The reports demonstrate beyond question that identical bidding is a commonplace phenomenon in a multitude of industries devoted to a myriad of products—from nuts and bolts to floating bridges. The significance of the reporting program, however, lies not in its *scope* but in its *purpose*. That purpose was revealed in the Letter of Transmittal accompanying the initial report (and included as the first page of the printed volume) written by the then Attorney General of the United States (Appendix G hereto). In the closing statement of his brief letter addressed to the President, the President of the Senate and the Speaker of the House of Representatives, the Attorney General asserts that, if the inclusion in the report of the bidders' names "contributes to public and business awareness and thus serves to discourage practices, *however lawful*, which, result in identical bids, *I believe the public interest would be well served thereby.*" (Emphasis added.) Similar declarations are contained in the Letters of Transmittal accompanying the second and third reports (Appendices H and I hereto), the latter signed by the present Attorney General of the United States.

While the Attorneys General grudgingly acknowledged the lawfulness of identical bids, as such, they assert a *conflict* between such bidding and the public interest. The Government in the instant case, intent upon promoting this same short-sighted concept of the public interest, paid lip service to the truism that identical bids are not in them-

selves illegal (Tr. p. 3351), but then proceeded to try the case on the theory that an antitrust violation was established notwithstanding the absence of a conspiracy. The thrust of the Government's case from beginning to end was that the *policies* of the defendants to attempt to meet the predicted low bid—policies which were only partially successful—were, in and of themselves, illegal.

While the Government's attack on this form of conscious parallelism permeates the record in this case, it is most clearly revealed in the three most important position-taking statements issued by the Government—the closing statement before the jury in the criminal case and the two "post-trial" briefs in the civil case:

1. In his closing statement to the jury, Government counsel pleaded with the jury to convict the defendants *solely* on the basis of their "false concept of competition", a concept which defendants shared (note the term) "consciously":

> "I would ask you, would you consider having the benefits of competition if in shopping at Red Owl or at the National store you find that both stores have a policy of matching prices? Do you think if you went to Donaldson's or Dayton's to buy a pair of shoes or a pair of gloves and you found they were matching prices, do you think that you would have the benefit of competition? Would you in the operation of your shop, your business, or if you happened to be a farmer, if in buying your supplies you went to your suppliers and found them lined in a body with this policy, we will match our competitor's but won't beat our competitors? Of course not, you don't have the benefit of competition.
>
> "I say that on defendant's false concept of competition alone, shared by these defendants con-

sciously, and in common, that they stand indicted and convicted of the charges made against them in this case." (Tr. pp. 3503-3505)

And at the very close of his summation, Government counsel unequivocally equated the defendants' *policies* (described as being "conscious") with an illegal agreement:

> "Return a verdict of guilty and, as jurors and as representatives of the citizenry at large who have a stake in what you are doing here today, you will be demonstrating that we have a clear concept of what competition means in our system of free enterprise *and that when we see sellers by conscious policy matching each other on bids, on prices, rather than trying to beat each other on bids, on prices, we have an agreement not to compete on price.*" (Tr. pp. 3533-3534; emphasis added)

2. Though defeated in the criminal case, and after having eighteen months in which to reflect upon the propriety of its legal approach, the Government elected to press its theory of conscious parallelism in the civil case. In its initial "post-trial" brief, the Government flatly stated (and here the key word is "aware"—a fair synonym for "conscious"):

> "It is sufficient then, to warrant a finding of combination, that defendants were aware that each was following a policy of 'meeting and not beating' and that they continued pricing in conformity with the policy." (Gov't. brief p. 22)[3]

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3. It is not clear whether the Government's use of the term "combination" reflected a belief or hope—stemming from this Court's decision in *United States* v. *Parke, Davis,* 362 U.S. 29 (1960)—that the standard of proof under Section 1 of the Sherman Act is somehow lessened when the word "combination" is seized upon as the semantic criterion rather than either of the other two operative terms appearing in Section 1, "contract" or "conspiracy". In any event the District Court spoke in terms of "conspiracy".

In this same brief, as a climax to his principal argument, Government counsel quotes from his interrogation of the Government's expert witness (in terms of a "conscious" policy to "match", i.e., to be parallel) and then squarely rests his case on the theory discredited by this Court in *Theatre Enterprises:*

> "Plaintiff's expert witness, Dr. Francis M. S. Boddy, Professor of Economics at the University of Minnesota, was asked, 'where there is a conscious policy on the part of sellers to match rather than to beat one another in price, would these sellers, in your opinion, be competing in price?' His answer: 'No, it would seem to me what you describe essentially is an agreement not to compete on price but to direct their modes of competition to some other form.' (Tr. 3312) In that posture, we submit, *defendants stand guilty of the violation as charged in the complaint, on the strength of their adherence to policy without more.*" (Gov't. brief pp. 24-25; emphasis added)

3. In its reply brief the Government addressed itself to the opposite side of the conscious parallelism coin—the question whether an agreement is the *sine qua non* of a violation of Section 1 of the Sherman Act. Government counsel took direct issue with defendants on this proposition and stated categorically:

> "It is not so, as defendants would have it, that there must be 'actual agreement'." (Gov't. reply brief p. 18)

A similar view has been expressed by Donald F. Turner, recently appointed by the President to the office of Assistant Attorney General in charge of the Antitrust Division. If Mr. Turner today holds the opinion voiced in his article entitled *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusal to Deal,* 75 Harv. L.Rev. 655 (1962), the relentless attack of the Department of Justice on the agreement requirement of Section 1 will

continue, for Mr. Turner's approach advocates an obliteration of this requirement through a redefinition of "conspiracy":

> "What if oligopolists, without overt, explicit agreement, simply drift into an identical pattern of, say, rigid zone pricing, in the conscious awareness of the mutual benefits to be gained from their doing so? Should this be held an unlawful conspiracy? I believe the answer should be 'yes,' . . ." (*Id.* at 675)

Defining interdependent decisions as those which are consistent with the individual self-interest of those concerned only if all decide the same way, Mr. Turner then concludes, at page 705 of the same article, that "Interdependence of decisions should be enough to establish horizontal agreement among competitors."

We submit that these views of the Government—as expressed by the Attorney General and the Department of Justice personnel charged with the enforcement of our antitrust laws—represent a gross misinterpretation of the Sherman Act. Such views reflect a failure to distinguish between means and ends. The *end*—price uniformity—is illegal if, and only if, the means used to accomplish that end are conspiratorial.[4] The crucial question in every

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4. *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3rd Cir. 1961); cert. denied, 369 U.S. 839. The Third Circuit in that case declined to predicate illegality on conscious parallelism:

> "In so deciding, we are not unmindful that the defendants' refusal to deal is as effective in foreclosing the plaintiff from the sea stores tobacco business as an agreement to do so would be. It has been argued that such uniform decisions, made under ecomonic circumstances tending to make the act of one firm or company dependent upon the reaction of others, violate Section 1 even though conspiracy is absent. With this we cannot agree. *Section 1 specifies means as well as ends.* Perhaps as a matter of public policy restraint of trade *per se* should be controlled but conspiracy is required in this case." (297 F. 2d at 207-8; emphasis added)

See also *United States* v. *Morgan*, 118 F. Supp. 621 (S.D. N.Y. 1953)

price-fixing case is whether the evidence proves the existence of a "contract, combination . . . or conspiracy", and decisional law makes it undeniably clear that each of these key statutory terms includes the element of *agreement.*

This failure to distinguish between what some economists deem to be "undesirable" *results* and the *means* which the statute prohibits—coupled, perhaps, with the doctrine that price-fixing is a *per se* offense—has caused some to question the principle that an agreement is the *sine qua non* of a price conspiracy. Perhaps a contributing cause to this uncertainty was this Court's opinion in *Interstate Circuit* v. *United States,* 306 U.S. 208 (1939), a case heavily relied on by the Government here. But in *Theatre Enterprises,* this Court made it very clear that the *Interstate Circuit* dictum was not to be misconstrued. Citing *Interstate Circuit* and other cases, this Court observed:

> "To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement, or phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy, but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." (346 U.S. at 540-1)

And this Court left no doubt as to what it meant by "conspiracy":

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express." (346 U.S. at 540)

It is equally well settled that the agreement which is the essential element of a Section 1 violation need not be a written or otherwise *express* agreement. But the concept of agreement necessarily implies an *exchange of assurances*[5] to take or to refrain from a given course of action. As expressed by the Seventh Circuit in *United States* v. *Standard Oil Co.*, 316 F.2d 884 at 890 (7th Cir. 1963): "It is the fact of commitment which is really at issue. This, in turn, involves the understanding of the parties."

While the District Court disavowed "conscious parallelism" as the basis of its decision, and concurred with defendants that an agreement is the *sine qua non* of a violation of Section 1, the court obviously placed primary reliance upon the Government's statistical evidence of bid identity. Government counsel attached to their post-trial brief a six-page tabulation showing what they deemed to be an overwhelming degree of identity.[6] Apart from its

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5. The exchange of assurances, of course, need not be made orally. The Ninth Circuit, in a recent, much publicized case, correctly observed that "A knowing wink can mean more than words." *Esco Corp.* v. *United States*, 340 F.2d 1000 at 1007 (9th Cir. 1965). Since the *fact* of the assurance or commitment is the key issue, the means employed to convey it is legally insignificant. Morton does take issue with a popular view of the *Esco* opinion which some read as supporting the theory that agreement is not a requirement of Section 1. This view is incorrect, for the Ninth Circuit in *Esco* stated that (1) agreement is the gist of the offense of price-fixing and (2) the term "agreement" necessarily implies mutual consent (340 F.2d at 1007).

6. The Government's chart was seriously misleading, in that it omitted important bids where there was little or no identity. An analysis of the bid tabulations in evidence reveals that, where Morton and Diamond bid against each other, only 65.5% of their bids were identical. In view of the fact that Morton and Diamond regularly attempted to meet the predicted low bid, and had at their

(continued on next page)

heavy reliance upon the Government's identity statistics, the District Court gave no indication whatsoever of any specific evidence in the record which led the court to conclude that Morton and Diamond had been conspirators rather than competitors. One can only conclude that the Government's expressed theory of bid identity plus "conscious adherence to policy" formed the basis of the trial court's reasoning.

Morton submits that the notion that parallel pricing action by businessmen is automatically evil must be laid to rest by this Court. It must be made clear that to *uphold* price identity resulting from agreement, and to *condemn* price identity resulting from unilateral action, are *equally* bad law and *equally* contrary to the public interest. In either case, the buyer is deprived of price alternatives (but not necessarily of a *lower* price), but only where his deprivation stems from an agreement among competitors is the buyer *unfairly* so deprived. Where price alternatives are lacking because of unilateral parallel action, any appraisal of such a situation is fundamentally defective if it does not take into account the following: *First,* that where, as here, distant suppliers must absorb freight in order to compete in the sale of a homogeneous commodity, the only realistic alternative to price uniformity may be the withdrawal from the market of all but the closest suppliers—creating a situation, obviously antithetical to the public interest, where each supplier has a "natural" monopoly delimited by his own freight advantage area; and *second,* the rights of *suppliers* as regards price determinations under a free enterprise system are as much a part of the

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(continued from preceding page)
disposal a great deal of legitimate information to be used for that purpose, an identity ratio of 65.5% is *remarkably low.* Such a percentage is *unbelievably low* if one accepts the District Court's finding of a bid-rigging conspiracy between Morton and Diamond.

public interest as the desires of *purchasers* for price alternatives. If the Government's view prevails, the American businessman will have lost the right unilaterally to price his product according to the dictates of the marketplace, a right which is completely in accord with the objectives of Section 1 of the Sherman Act and which must be preserved if the statute is to continue as a "charter of economic freedom".

II. Question No. 2

The second question presented by this appeal, a question of equal if not greater importance than the question relating to the doctrine of conscious parallelism, is whether the Federal Government, consistent with the doctrine of *res judicata* and with constitutionally imposed standards of fair play, can subject a defendant to a "civil" prosecution after having been defeated in a criminal suit involving the identical alleged Sherman Act offense. Morton submits that this Court should refuse to sanction this double-prosecution practice which currently the Antitrust Division apparently is employing with regularity.[7] A defendant who (notwith-

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7. In the seventy-five year history of the Sherman Act, the Antitrust Division until recently has rarely prosecuted companion civil cases after having been defeated in the criminal case. This now seems to be the rule rather than the exception. In addition to the instant case, other *pending* cases in which the Government has proceeded civilly after losing the criminal case include *United States* v. *Huck Manufacturing Co.*, 227 F. Supp. 791 (E.D. Mich. 1964), prob. juris. noted, 85 S. Ct. 646 (1965); *United States* v. *General Motors Corp.*, 234 F. Supp. 85 (S.D. Calif. 1964); 1964 Trade Cases ¶ 71,250 (S.D. Calif. 1964); prob. juris. noted, 334 U.S.L. Week 3304 (U.S. March 16, 1965), and *United States* v. *Johns-Manville Corp.*, 237 F. Supp. 885 (E.D. Pa. 1964).

standing the one-sided advantage accruing to the Government from its "trial run" before the grand jury—here, *two* grand juries) successfully runs the gamut of a criminal antitrust prosecution should not be compelled to defend a second prosecution for the same alleged offense.

A. The Doctrine of Res Judicata Bars a Second Prosecution.

Morton suggests that this Court reinstate with clarity the principle it enunciated in *Coffey* v. *United States,* 116 U.S. 436 (1886). That case involved a civil forfeiture suit following a jury acquittal of a criminal charge of tax evasion. This Court stated the legal question and its answer in the following succinct manner:

> "The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of the opinion that it is." (116 U.S. at 442.)

In *United States* v. *Real Estate Boards,* 339 U.S. 485 (1950), this Court took a different tack. The holding there—limited to *res judicata*—was that a prior acquittal in a criminal case was not a bar to a subsequent civil case based on the same facts because the burden of proof in the criminal case was greater than the burden of proof in the civil case. But this Court in *Coffey,* although it expressly acknowledged that a difference in burden of proof might influence the outcome of the civil suit, rejected this procedural technicality for purposes of the question before the Court:

> "It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem. *Nevertheless, the fact or act*

> *has been put in issue and determined against the United States;* and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant." (116 U.S. at 443; emphasis added)

Thus, *Real Estate Boards* and *Coffey* stand in conflict.[8] But *Coffey* is *not* in conflict with the cases which formed the basis of decision in *Real Estate Boards,* for in each of those cases (*Stone* v. *United States,* 167 U.S. 178 (1897), *Murphy* v. *United States,* 272 U.S. 630 (1926) and *Helvering* v. *Mitchell,* 303 U.S. 391 (1937)) the criminal suit involved at least one *element of proof,* i.e., intent, which was not a part of the civil suit. But where, as here,[9] the criminal and civil suits involve *identical* elements of proof, the prior acquittal should be held to bar a second prosecution by the Government.

The conflict between *Coffey* and *Real Estate Boards* should be resolved in favor of *Coffey* on the basis of fair-

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8. The *Coffey* decision was distinguished in *Real Estate Boards* on the ground that *Coffey* involved a civil suit which was "punitive in character". 339 U.S. at 493, n. 6. It is difficult to understand why this difference should be controlling—or even relevant—as regards the issue of *res judicata,* since this Court held in *Coffey* that the difference in burden of proof was not material to the issue presented in that case. ***In any event, Morton submits that, for the reasons set forth under caption "B" below, a Government civil suit is punitive.***

9. Since price-fixing is a *per se* offense under the Sherman Act, no element of intent need be shown. So no elements of proof were involved in the "companion" criminal suit other than those involved in the instant case. And, as already noted, the record was also virtually identical.

ness considerations. If *Real Estate Boards* is upheld, the Government can file a criminal case with much to gain and virtually nothing to lose, for if a verdict is won by the Government, it can plead that verdict in a "companion" civil case and automatically obtain an adjudication of violation,[10] but if the Government loses, it has only to try the civil case to obtain a second chance of victory.

Perhaps such a drastic imbalance would be justified on the basis of differences in burden of proof *if* there were some way to ascertain that such a difference was determinative in the minds of the jury. But without violating the sanctity of the jury's deliberations, who can deny that it would have returned its unanimous not guilty verdict had the trial court instructed it in terms of the preponderance of the evidence rule? To sanction this second prosecution on the theory followed in *Real Estate Boards* is thus to permit this serious deviation from the principle of equality inherent in our adversary system on the mere *possibility* that the jury viewed the evidence in favor of the defendants as sufficient to create a reasonable doubt but as falling short of preponderance. Clearly, the fairer test is that of *Coffey*: where "the fact or act has been put in issue and determined against the United States", the principle of *res judicata* should bar the Government from re-litigating that issue.

B. The Protections Afforded by the Fifth Amendment Bar a Second Prosecution.

It has long been decided, but only recently reaffirmed, that the form of an action is not determinative of the applicable constitutional safeguards. Thus, the *Coffey* doctrine was predicated in part upon the fact that the proceeding involved in that case, although civil in form, was punitive

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10. *Local 167* v. *United States*, 291 U.S. 293 (1934).

in nature. In a case decided by this Court on April 29, 1965, *One 1958 Plymouth Sedan* v. *Pennsylvania*, 33 U.S.L. Week 4387 (U.S. April 29, 1965), this Court again refused to look to the form of an action as being determinative of the procedural safeguards to be applied. Relying on *Boyd* v. *United States*, 116 U.S. 616 (1886), decided the same year as *Coffey*, this Court characterized a civil forfeiture proceeding as "quasi-criminal" and on that basis applied the exclusionary rule relating to unconstitutionally seized evidence—a rule which theretofore had been held by many courts to be applicable only to criminal cases. *1958 Plymouth* thus enhanced the stature of *Coffey* which some courts had relegated to the status of a useless antique.

On the basis of *Coffey*, as reinforced by *1958 Plymouth*, the Government was constitutionally foreclosed from prosecuting the instant case after being defeated in the criminal case *if* actions by the Government under Section 4 of the Sherman Act are properly characterized as "quasi-criminal". Morton submits that such a legal characterization is the only proper one because (1) in order to prevail in "civil" injunction cases, the Government has to prove a crime, and (2) one of the principal *purposes* of Government injunction actions is to aid potential litigants by facilitating the prosecution of treble damage actions—which, as this Court has said, are *punitive*. Each of these reasons will be discussed in turn.

1. Section 1 of the Sherman Act is a *criminal* statute. And since the elements of a violation of that statute are identical whether the action brought to enforce the statute is civil or criminal, the Government cannot prevail in an injunction suit unless it proves a crime. Moreover, Section 4 of the Sherman Act, the statute under which the instant case was brought, confers equity jurisdiction only where a crime has been established.

The necessity in Government equity suits for the establishment of a criminal violation was acknowledged in early cases. In *United States* v. *Swift,* 188 Fed. 92 (N.D. Ill. 1911), the court said:

> "The Sherman Act is primarily a *criminal* statute. The equitable remedy provided by section 4 does not authorize the Circuit Courts of the United States to enjoin restraints of trade, as such; . . . On the contrary, it invests the Circuit Court . . . with jurisdiction to prevent . . . 'violations of this act'; . . . It follows, therefore, that unless that which is sought to be enjoined is a violation of the act under one of the preceding sections, in other words, that, *unless that which is sought to be enjoined is a crime, it cannot be enjoined,* because it is only that which is made a crime by the statute which is subject to the equity jurisdiction. Therefore, if injunctions heretofore have been upheld by the Supreme Court, the Supreme Court in upholding them necessarily has determined that the things which were enjoined were crimes, as defined by one at least of the first three sections of the act." (188 Fed. at 96; emphasis added)

The following year this same principle was reaffirmed in *United States* v. *Patterson,* 201 Fed. 697 (S.D. Ohio 1912), and more recently the criminal nature of the violation sought to be enjoined was emphasized in *United States* v. *Procter & Gamble Co.,* 187 F. Supp. 55, (D.N.J. 1960):

> "Here the well established principle must be borne in mind that equity has no general jurisdiction over cases brought for the violation of the Sherman Act, but only has jurisdiction based on a criminal violation of the Act in order to prevent the recurrence of such a violation in the future." (187. F. Supp. at 58)

The Government may argue that, while it does have to establish a violation of a criminal statute in injunction suits, it does not have to prove a crime because of the

different burden of proof obtaining in equity suits. Such an argument would not only be in conflict with the foregoing decisions but would also clash with this Court's decision in *1958 Plymouth*. In that case, an action brought under a statute which (like the Sherman Act) also provided for criminal proceedings, this Court made the following significant observation:

> "It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, *requiring the determination that the criminal law has been violated,* the same evidence would be admissable." (33 U.S.L. Week at 4389 (U.S. April 29, 1956); emphasis added)

This Court in *1958 Plymouth* also reaffirmed *Boyd's* rejection of the argument that a person's constitutional rights would be adversely affected by the fact that an action was brought *in rem* rather than *in personam*. The distinction, though important for some purposes, is sufficiently "technical" to be disregarded for purposes of determining fundamental constitutional protections. Similarly, as necessarily implied in the above-quoted statement, the technical distinction between burden of proof in criminal and "civil" cases is unworthy of being the determinative factor where constitutional rights are concerned.[11]

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11. Some courts have expressed concern over this troublesome issue of burden of proof in treble damage cases. In commenting on the solemn responsibility of the jury, the Fifth Circuit said:

> "In a case of this kind, if the jury finds that the plaintiff is entitled to recover at all, the statute permits the trebling of the amount as a *penalty*, and to that extent, *it partakes of the nature of a criminal charge*, for which reason, it would seem, *the proof should be stronger than in an ordinary civil action.* Hence, the trial court should impress upon the jury as clearly as possible the meaning of the phrase 'preponderance of the

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2. One of the Government's principal purposes in prosecuting civil or criminal cases is to aid private persons who are potential treble damage plaintiffs by invoking the provisions of Section 5 of the Clayton Act. That the dispensing of such aid to potential litigants has been one of the avowed objectives of the Government since at least 1960 is admitted openly by Department of Justice officials[12] and has been noted by the judiciary. In *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wisc. 1962) the court made reference to this "policy" of the Antitrust Division:

> ". . . its present insistence that any consent judgment be given prima facie effect stem, as we have stated, from a new policy of the Antitrust Division, a policy which is designed to aid certain treble damage claimants in prosecuting their claims . . ." (203 F. Supp. at 661)

In a recent civil prosecution following an acquittal in the companion criminal case, the Government cited this same policy as a reason for opposing defendant's motion for summary judgment. The court described the Government's

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evidence.'" (*Paramount Film Distributing Corp.* v. *Applebaum*, 217 F. 2d 101 at 105 (5th Cir. 1954); emphasis added) The Fifth Circuit's comment was recently cited with approval in *Clark Marine Corp.* v. *Cargill, Inc.*, 226 F. Supp. 103 (E.D. La. 1964), where the district court's criterion was stated in terms of the trier of facts' being "solidly convinced":

> "A plaintiff, in a triple damage action such as this, carries a heavy burden of proof, and the trier of facts must be solidly convinced that petitioner has proved its case by a preponderance of the evidence." (226 F. Supp. at 111)

12. Statements to this effect issued from the Office of the Attorney General and by members of the Attorney General's staff are collected under caption II C of Defendants' Motion to Dismiss the Indictment which, by virtue of Defendants' Post-Verdict Motion, became a part of the record in this case.

argument, and then rejected it in language particularly appropriate to the instant case:

> "The Government cites *United States* v. *Standard Ultra-marine Color Co.*, 137 F. Supp. 167 (S.D.N.Y. 1955) for the proposition that private litigants must not be deprived of the benefit of prima facie showing of liability in their private actions. . . . Although Congress has declared a public policy in favor of aiding private antitrust litigants, the Government has had one day in court already in an attempt to vindicate this public interest when it tried the criminal trial." (*United States* v. *Johns-Manville Corp.*, 237 F. Supp. 885 at 891-2 (E.D. Pa. 1964)).

This ulterior purpose of assisting treble damage litigants renders Government injunction actions punitive, because treble damage actions are clearly punitive.[13] The most recent of the cases holding treble damage actions to be punitive, *Leh* v. *General Petroleum Corp.*, 330 F.2d 288 (9th Cir. 1964) is especially significant because of this Court's approach to its review of that decision. After an exhaustive discussion of the subject, the Ninth Circuit in *Leh*, observing that the *Report of the Attorney General's*

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13. Courts have held treble damage actions to be punitive for many purposes. For example, on five separate issues, at least four of which are purely "federal" in nature, the Seventh Circuit has held treble damage actions to be punitive: *Bigelow* v. *RKO Radio Pictures, Inc.*, 150 F. 2d 877 (7th Cir. 1945) (impact of trebling requirement upon jury's evaluation of evidence); *Hoskins Coal & Dock Corp.* v. *Truax Traer Coal Co.*, 191 F. 2d 912 (7th Cir. 1951) (statute of limitations); *Milwaukee Towne Corp.* v. *Loew's Incorporated*, 190 F. 2d 561 (7th Cir. 1951) (interpretation of "reasonable attorneys' fees" under Section 4 of the Clayton Act); *Commissioner* v. *Obear-Nester Glass Co.*, 217 F. 2d 56 (7th Cir. 1954) (taxability of treble damages); and *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F. 2d 284 (7th Cir. 1954) (whether single damages can be recovered under Section 4 of the Clayton Act).

National Committee to Study the Antitrust Laws (1955) indicates a ". . . common acceptance among knowledgeable specialists in antitrust law of a belief that the trebling of damage constitutes a penal statute, . . ." (330 F.2d at 301), held that treble damage actions were punitive. While this Court granted *certiorari,* the grant did *not* include the question raising the penalty issue—nothwithstanding the fact that, as observed in the petition for certiorari, the Ninth Circuit's decision constituted a repudiation of this Court's decision in *Chattanooga Foundry & Pipe Works* v. *Atlanta,* 203 U.S. 390 (1906). That this Court should leave undisturbed the Ninth Circuit's holding as to the nature of treble damage actions is consistent with its opinion in *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426 (1955), a case involving the income tax status of treble damage actions:

> "The mere fact that the payments were extracted from the wrongdoer as *punishment* for unlawful conduct cannot detract from their character as taxable income." (348 U.S. at 431; emphasis added)

In striking the affirmative defenses raised by the defendants, the District Court alluded to *Real Estate Boards* as being determinative of the issues, notwithstanding the fact that that case was limited to *res judicata* and did not involve any Fifth Amendment issue. (App. A-1) In any event, the District Court's decision is in conflict with the broad principle underlying *Coffey* and *1958 Plymouth* which must take precedence over the technical rule followed in *Real Estate Boards. Both* the doctrine of *res judicata* and the concept of fairness underlying the Fifth Amendment should have foreclosed the Government from this second prosecution and prevented the effective nullification of the jury's not guilty verdict.

CONCLUSION

This appeal presents substantial questions of public importance under the antitrust laws. Probable jurisdiction should be noted.

Respectfully submitted,

L. M. McBride
John P. Ryan, Jr.

Counsel for Morton Salt Company

June, 1965

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY,
INTERNATIONAL SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,

Defendants.

ORDER

Plaintiff has moved to strike the second, third, fourth and fifth defenses in the answers of the defendants.

As to the defenses of res judicata, double jeopardy, and collateral estoppel, they are predicated upon the premise that the prior criminal proceeding in which there was a verdict of not guilty is a bar to the subsequent civil action on the same issues. Clearly, in view of the teachings of *United States* v. *Real Estate Boards,* 1950, 339 U.S. 485, this position is untenable. As Justice Douglas observes, pp. 493-494,

> "* * * It has been repeatedly held that though the civil suit is bottomed on the same facts, it is not barred by the prior judgment of acquittal in the criminal case. See Stone v. United States, 167 U.S. 178; Murphy v. United States, 272 U.S. 630; Helvering v. Mitchell, [303 U.S. 391]."

Coming now to the fifth defense that the complaint fails to state a cause of action, I see no purpose in striking this defense. The defendants have the right to preserve this defense by way of their answers. The rules so provide. Presumably, one could follow either Judge Dimock in *Lehman Trading Corporation* v. *J & H Stolow, Inc.*, S.D.N.Y., 1960, 184 F.Supp. 21, or Judge Cashin in *Rosenblatt* v. *United Air Lines*, S.D.N.Y., 1957, 21 F.R.D. 110. But my view is that the complaint states a cause of action, and if defendants had requested a ruling thereon, that would be the tenor of my order. However, I see no purpose in striking out the defense as pleaded at this time.

It follows from the foregoing that plaintiff's motion to strike the second, third and fourth defenses of defendants' answers is hereby granted. The motion to strike the fifth defense is denied. It is so ordered. Exceptions are reserved.

Dated this 25th day of January, 1963.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY,
DIAMOND CRYSTAL SALT COMPANY,

Defendants.

MEMORANDUM DECISION

This cause comes before the Court on a stipulation filed November 4, 1963, whereby the issues herein are submitted on the record in a criminal proceeding between the same parties.

Mr. John W. Neville, Mr. Jerome A. Hochberg, and Mr. Robert J. Rotatori, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the plaintiff;

and

Mr. L. M. McBride and Mr. John P. Ryan, Jr., Chicago, Illinois (Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson and Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, of counsel) in behalf of defendant Morton Salt Company;

Messrs. Bowen, Bowen, Preus, Farrell & Adams, Minneapolis, Minnesota, and Messrs. Dickinson, Wright, McKean & Cudlip, Detroit, Michigan, in behalf of defendant Diamond Crystal Salt Company.

Defendants are charged with violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, the pertinent portion of which reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

The complaint alleges a conspiracy to fix the prices of rock salt. The issues herein are limited to sales to public authorities under sealed bids. The defendants in this civil proceeding are Morton Salt Company and Diamond Crystal Salt Company. Originally, Carey Salt Company and International Salt Company were parties, but consent decrees have been entered as to them. The co-conspirators not named as parties herein with which the evidence is concerned primarily are Cutler-Magner Company, of Duluth, Minnesota, a distributor for Morton Salt Company, and Cargill Corporation, of Minneapolis, Minnesota, a distributor for Diamond Crystal Salt Company. The governmental agencies concerned are located in the States of Minnesota, Wisconsin, Michigan, Illinois, Ohio and Indiana. In these areas, the parties share some 85 to 95 per cent of the rock salt business. The annual sales to governmental agencies are admittedly substantial.

It is the plaintiff's contention that the record herein amply substantiates a finding that, during the period from 1956 to 1960, these defendants, with others involved acting in concert, adopted a policy of restrictive pricing of rock salt to the end that separate bidding on this commodity to be furnished to the various governmental agencies in the area involved should produce identical prices. This plan, according to the plaintiff, was carried out primarily by a so-called formula price fixing; that is, the defendants maintained arbitrary f.o.b. mine prices which bore no relation to

their costs of production, overhead, or anticipated profits; that a method or plan was devised by the conspirators whereby each of the defendants, according to a pre-arranged plan or understanding in preparing bids to a particular governmental agency, would first determine in order to meet the competitive price of the other competitors, the latter's f.o.b. prices. The f.o.b. prices were maintained, according to the plaintiff, at a high enough level to protect the pricing policy of the defendant suppliers, and directed to constitute a means whereby each of the rock salt suppliers in the industry would be better enabled to meet the bidding price of any particular supplier. In addition, plaintiff contends that a defendant bidder would in most instances include the rail freight rates of its competitor or competitors even though the shipment was to be made by water or by truck, knowing that to be the method which would be employed by its competitors in determining their bidding prices. In other words, plaintiff contends that if A is to bid against B, A will attempt to frame its bid on B's f.o.b. mine price and freight rates, whether artificial or not, in attempting to compute a competitor's delivered price, and with the designed purpose of meeting, that is, to match, and not beat, the bidding price of its competitor or competitors. Plaintiff recognizes that, in addition, there is a practice among the defendants to obtain post-bidding information of their competitors. These practices, however, according to plaintiff, are all designed to carry out an understanding as to uniform bid prices among the suppliers of rock salt even though their purpose and intent may not always be attained. In other words, plaintiff contends that there was a concerted plan among the defendants to meet the price of all competition in all bidding so far as that plan could be accomplished. Plaintiff contends that its position as to the plan and practice followed by the industry in this regard is not only directly sustained by the evidence, including the meetings of

the parties with each other to achieve this end, but that the record reflects what it terms a monotonous identity of the bids among the defendants. For instance, plaintiff points out that to the State of Minnesota in 1956, Morton, Cutler-Magner and International bid identically on some 67 locations. In 1957, to this State, the same bidders were identical on 57 locations. In 1958, to Minnesota, Cutler-Magner, International and Cargill were identical at 68 out of 69 delivered locations, and on a re-bid they were identical 53 times. In 1959, Cutler-Magner, International and Cargill participated in four separate invitations to bid to Minnesota, and on some 273 occasions the bids were from 95 to 100 per cent identical. In 1960, to the same State, Cutler-Magner, International and Cargill were identical on 135 different bids involving truck and railroad bag deliveries, and on some 41 bids during that year, Cutler-Magner and Cargill were identical 90 per cent of the time. And to the City of Minneapolis during a period from 1957 to 1960, the Morton or Cutler-Magner or Cargill bids with International 47 times on bulk truck, bulk pick-up, bag truck or bag pick-up bids were identical. Diamond, however, submitted no bids to Minnesota municipalities during the period in question.

The record of Morton and International with Cutler or Cargill in bids to the State of Wisconsin in 1956, 1957, 1958 and 1959 reflects a percentage of identical bidding which varies from 94 to 100 per cent. In bids to the City of Milwaukee, Wisconsin, Morton and International were identical from 1956 to 1960. A similar record as to Morton and International was reflected in bidding to the City of Detroit, Michigan, the State of Ohio and the State of Ohio Turnpike Commission. Diamond, however, in 1958 as to Wisconsin area destinations was non-identical in 41 out of 62 bids, and in 1959 there was non-identity in 52 out of 72 of its Wis-

consin bids, and on re-bids for that year Diamond was completely non-identical. In 1960 Diamond's bid to the State of Wisconsin was 94.4 per cent identical in 67 out of 71 bids, and 100 per cent identical in four bids with Morton and International to the City of Milwaukee. However, in 1960, as to Wayne County Road Commission of Michigan, Diamond was 100 per cent in identity as a bidder in some 17 bids with Morton and International. As to Illinois bidding in the year 1957, Diamond, International and Cargill, out of 181 bids, were identical in 165, or 91.2 per cent, and in 1959, in bag railroad and bulk railroad, Morton, Diamond and International in some 45 bids were 100 per cent identical, and in 1960, 90 per cent identical. These Illinois bids were made to the State of Illinois Highway Division. In bids to the State of Illinois Toll Road Commission, Diamond, Morton, International and Cargill were 100 per cent identical in the year 1960 in some 16 bids. In Ohio in the years 1958 to 1960, Diamond's record as to identity of bids carried from 94.3 to 100 percent in identity.*

The position of the defendants may be summarized as follows: Rock salt is a homogeneous substance which for the purpose of de-icing is of the same quality regardless of the producer. It is bought strictly on the basis of price. According to the defendants, business experience has fully established the necessity of attempting to have uniformity in bids made to governmental agencies. Uniformity in bidding is therefore attempted to be attained by an examination of prior bids of competitors and an independent analysis is made by each of the defendants in framing bids in an attempt to meet the bids of competitors so as to avoid

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* The above recited statistical data as to the results of bidding do not assume to include a summary of the entire record with respect thereto, but it is fairly representative and the percentages quoted are substantially correct.

the debacle in the rock salt market if price cutting were entered upon. Thus, it is argued that, although there is an individual attempt to attain uniformity in the bids made to the various governmental agencies, this attempted result is not due to any concert of action or understanding among the defendants but represents the individual exercise of common business prudence. According to the defendants, the identity of bids which the Government stresses as evidence of conspiracy to fix prices is due to four principal factors: (1) The factor growing into the make-up of most bids, i.e., the f.o.b. mine price and the common knowledge of freight rates; (2) prior bids of competitors to any governmental agencies in any State are made known and made use of in framing the next year's bids by competitive bidders; (3) additional competitive information is attained by each of the defendants obtaining public data disclosed at the opening of bids; and (4) the number of major companies producing rock salt is sufficiently small so that the bidding practices may be analyzed and followed by the others. Thus, it is urged by the defendants that the Government's attempt to deduce collaboration from mere identity of bids is completely frustrated by the record herein. It is the position of the defendants that the identity of bids stems from the attempt to adopt and match bids of competitors with the defendants acting individually in the best interests of their companies. Each of the defendants points out that the mere individual following of a competitor's announced price is not illegal even if it is carried out with the intent of achieving identical prices. Self interest, it is argued, dominates the interest of each defendant in its individual attempt to match a competitive price and not a conspiracy or understanding among the defendants, as the Government charges. In addition, the defendants argue that the express denials of collusion by the officials of the defendants fully negatives the assumption which the Government assumes to deduce from parallelism in prices. And the defendants vigorously

emphasize the evidence of aggressive competition among the defendants, at least at certain periods during the existence of the alleged conspiracy.

At the outset, it must be recognized that identical bids do not necessarily indicate that they emanate from collusion or conspiracy on the part of the defendants to fix prices. Moreover, ruinous competition among the producers of rock salt may well spell disaster to the entire industry. On the other hand, if there is a conspiracy to fix prices in violation of the law, defendants may not justify their action by the contention or defense that they were motivated to enter into it in order to avoid ruinous competition. It is difficult to analyze this entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny without concluding that this anomalous result was obtained in no other manner than by an adherence to a plan adopted by consultation and conferences among the parties involved. That the plan did not at all times prove effective and that there were sporadic departures therefrom is readily apparent. But equally so are the incidents as to conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties.

In finding that the plaintiff has established by a fair preponderance of the evidence that there was an agreement among these defendants to meet the bid prices of the various rock salt bidders who filed written bids with governmental agencies during the period in question and in the geographical area referred to, the Court is entirely mindful that at times when it seemed to suit their purpose, these companies have taken independent action by way of bid prices. Moreover, Morton Salt Company obtained a controlling interest in certain Canadian companies in order to compete with International, which resulted in a marked increase in the business of Morton and to the detriment

of the business of International. There is evidence that during the period covered by the complaint, not only was Diamond merely partly successful in meeting bid prices of its competitors, but that it adopted new techniques in the distribution of rock salt whereby Diamond and its distributor, Cargill, markedly increased their sales to the dimunition [sic] of sales by some of the other defendant competitors. Admittedly, these circumstances may seem inconsistent with the position of the Government with reference to the alleged understanding to avoid competition in the bid prices of rock salt. But, on the other hand, it is not the position of the plaintiff that the understanding and plans of the parties at all times operated with complete efficiency. The defendants agree that they did attempt *individually* to meet the bid prices of other competitors in order to avoid a spiral of prices downward which allegedly would have been ruinous to the industry. The fact that there were, during the period in question, instances of aggressive competition and strategy in attempting to build up the individual business postion by one or more of the defendants does not negative the affirmative evidence that during the period in question there was in effect among the defendants a concerted plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the governmental agencies in the areas involved. Price fixing practices by a concert of action which are condemned by the law are not freed from the law's impact merely because the plan at times broke down by the competitive acts of the so-called mavericks in the industry, or that there was not uniformity at all times in the carrying out of the plan. Moreover, even legitimate sources of information as to previous bids or computation of bids to meet a competitor's bid which are made on factors well known to all in the industry, if gathered and obtained in pursuance of a plan and under-

standing between and among the parties that the prices of rock salt should be uniform, may be considered as activities in furtherance of an illegal conspiracy.

In making the foregoing observations, this Court has fully recognized the principle that defendants emphasize, to wit, that an agreement is a *sine qua non* of a price conspiracy, and that the language of the Supreme Court in *Theatre Enterprises* v. *Paramount Film Dist. Corp.*, 346 U.S. 537 (1954), at pp. 540-41, is particularly pertinent here:

> "* * * To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

However, we do not only have circumstantial evidence of consciously parallel behavior, but sufficient additional facts and circumstances which amply justify the Court in concluding that by the greater weight of all the evidence the plaintiff has sustained the burden of proof which the law imposes upon it.

Plaintiff may, on September 14, 1964, at ten o'clock A.M., upon appropriate notice, present proposed findings of fact and conclusions of law and order for judgment consistent herewith. Exceptions will be reserved to the defendants.

Dated this 6th day of August, 1964.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,

Defendants.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

The complaint in this case, which was filed on July 11, 1961, alleges a conspiracy to fix the prices of rock salt. Except for the prayer for relief and other appropriate charges in form therein, the complaint is identical to an indictment filed June 28, 1961, in Criminal Action No. 4-61 Cr. 65, against Morton Salt Company ("Morton"), International Salt Company ("International"), Diamond Crystal Salt Company ("Diamond"), and Carey Salt Company ("Carey"). Prior to the trial of said criminal action, Carey pleaded *nolo contendere* and concurrently therewith a consent judgment was entered against Carey in this civil case. On June 7, 1962, after a trial which commenced on May 2, 1962, Morton, International and Diamond were acquitted of the charge set forth in the indictment by the jury impaneled in said criminal action. On November 4, 1963, a

consent judgment was entered against International in this case. Pursuant to a "Stipulation Re Trial of Case on Record," filed November 4, 1963, plaintiff, Morton and Diamond agreed that this case be tried on the record made in said criminal action, as supplemented by plaintiff's interrogatories 1 and 2 filed in this case, Morton's answers thereto, and Diamond's answers thereto, as amended. The initial briefs of the plaintiff and of each defendant were concurrently filed on or about December 2, 1963, and their responsive briefs were concurrently filed on or about December 23, 1963. This Court's Memorandum Decision was filed on August 6, 1964.

Mr. John W. Neville and Mr. Jerome A. Hochberg, Attorneys, Department of Justice, Washington, D. C., appeared in behalf of the plaintiff;

Mr. L. M. McBride and Mr. John P. Ryan, Jr., of Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson, of Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, in behalf of defendant Morton Salt Company;

Mr. Fred W. Freeman and Mr. George B. Martin, of Messrs. Dickinson, Wright, McKean & Cudlip, Detroit, Michigan, and Mr. Robert E. Bowen, of Messrs. Bowen, Bowen, Preus & Farrell, Minneapolis, Minnesota, in behalf of defendant Diamond Crystal Salt Company.

FINDINGS OF FACT

I

The following Findings of Fact are limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Diamond from 1957 to 1960, and by other co-conspirators during that period, made under sealed bids submitted to one or more of the following government agencies: State of Minnesota,

City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike.

II

Rock salt is the term applied to solid sodium chloride and its impurities as it is found in nature. It is mined in five principal sections of the United States, namely Louisiana, Kansas, Michigan, Ohio and New York. Defendants ship rock salt in interstate commerce.

The location of the mines which were the principal sources of rock salt sold to government agencies in the Six-State Midwest Area during all or part of the years 1956-60 are as follows:

Detroit, Michigan—International
Ojibway, Ontario, Canada—Morton
Fairport, Ohio—Morton
Jefferson Island, Louisiana—Diamond
Goderich, Ontario, Canada—Sifto Salt Limited, from which Diamond purchased rock salt for resale in the United States during 1960
Hutchinson, Kansas—Carey
Kanapolis, Kansas—Independent Salt Company
Lyons, Kansas—American Salt Company

Until January, 1957, Diamond did not produce rock salt and did not sell rock salt to government agencies. At that time it acquired Jefferson Island Salt Company whose only rock salt mine is located at Jefferson Island, Louisiana.

III

International, Morton and Diamond among them share 85-90% of the rock salt market nationwide. This degree of

control is present specifically in the Six-State Midwest Area, i.e., Minnesota, Wisconsin, Michigan, Illinois, Ohio, and Indiana, the subject of concentrated proof at trial.

IV

Defendants, with co-conspirators, in concert, adopted a policy of restrictive pricing of rock salt to the end that bidding on this commodity to be furnished to the various governmental agencies with which the conspirators did business should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, "meeting but not beating the price of a competitor."

V

The policy was carried out in the main by a system of formula pricing consciously adhered to by the conspirators, relying primarily on the following:

(a) The conspirators, by concert of action, would use the same f.o.b. mine prices in computing delivered prices.

(b) The f.o.b. mine prices so used bore no relation to the conspirators' costs of production, overhead, or anticipated profits, but were maintained at a high enough level to protect the pricing policy and better enable the conspirators to meet one another's prices.

(c) The conspirators, by concert of action, would use artificial freight rates in computing delivered prices.

VI

Concert of action among the conspirators was achieved by the conspirators maintaining among themselves a system of intelligence, the specifick [sic] purpose of which was to as-

sure adherence to formula and arrive at identical prices to public authorities.

VII

The system of intelligence was maintained by telephone calls and by meetings held periodically among the conspirators. The calls and meetings were among officers of the conspirators at the higher echelons. Meetings took place in Minnesota, Illinois, Michigan and elsewhere.

VIII

The effect of the conspiracy on public authorities was to cause bids to said public authorities for de-icing salt, including the sixteen mentioned specifically in the Government's proofs as indicative of bids made by the conspirators to public authorities generally, to be identical to a substantial and in many instances to an extraordinary degree, thereby depriving said public authorities of the advantage of competitive bidding.

IX

Plaintiff has sustained its burden of proof not only by evidence of consciously parallel behavior but also by abundant positive evidence of outright collaboration establishing the existence of agreement and understanding among the parties.

X

The fact that there were instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants, or the fact that there were breakdowns or interruptions in the uniformity of price patterns caused by so-called "mavericks" or otherwise, does not negative the preponderantly affirmative evidence established by the record as a whole

that there was in effect among the conspirators a concerted and continuing plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the government agencies with which the conspirators did business.

Upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The defendants are and have been engaged in trade and commerce among the several States in the sale of rock salt. The Court has jurisdiction of the parties and the cause of action herein.

2. The defendants Morton Salt Company and the Diamond Crystal Salt Company have combined and conspired to fix prices in the sale of rock salt in violation of Section 1 of the Sherman Act as charged in the complaint.

3. A final judgment consistent herewith will be entered.

Exceptions are reserved.

Dated this 24 day of November, 1964.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,

Defendants.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim

upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III

The provisions of this Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their respective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from

entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges except with prospective purchasers in

connection with bona fide purchase or sale negotiations or published offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

The defendants Morton Salt Company and Diamond Crystal Salt Company are each ordered and directed, for a period of three years after the date of entry of this Final Judgment, to submit a sworn statement in the form set forth in appendix hereto, with each bid for rock salt submitted to any governmental body, such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid; and a duplicate of each such sworn statement and of such bid, together with the work papers used in the preparation of such bid shall be kept in the files of the defendants for a period of three years from the date of execution of such bids.

VIII

Nothing in this Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defend-

ants act in violation of any law or regulation of the United States of America.

IX

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Salt Company or defendant Diamond Crystal Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

X

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly author-

ized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

XI

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this decree are reserved.

Dated this 24th day of November, 1964.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

APPENDIX

AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to .....
(name of recipient of bid) dated .....
has not been prepared by .....
(name of defendant) in collusion with any other seller of rock salt, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of .....
(name of defendant), to any other seller of rock salt and will not be communicated to any such seller,

in violation of the Final Judgment in Civil No. 4-61 Civ. 162 entered by the United States District Court for the District of Minnesota on November 24, 1964.

Dated: ....., 196

.....
Signature of person responsible for the preparation of the bid

.....
Signature of officer

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,

Defendants.

ORDER

The defendants have made a motion to alter or amend the Final Judgment herein entered on November 24, 1964.

Mr. John W. Neville and Mr. Jerome A. Hochberg, Attorneys, Department of Justice, Washington, D. C. appeared in behalf of the plaintiff;

Mr. L. M. McBride and Mr. John P. Ryan, Jr., of Messrs. McBride, Baker, Wienke & Schlosser, Chicago, Illinois, and Mr. John G. Robertson, of Messrs. Oppenheimer, Hodgson, Brown, Wolff & Leach, St. Paul, Minnesota, in behalf of defendant Morton Salt Company;

Mr. Fred W. Freeman and Mr. George B. Martin, of Messrs. Dickinson, Wright, McKean & Cudlip, Detroit, Michigan, and Mr. Robert E. Bowen, of Messrs. Bowen, Bowen, Preus & Farrell, Minneapolis, Minnesota, in behalf of defendant Diamond Crystal Salt Company.

After due consideration, the motion to alter or amend is granted to the extent reflected in Paragraphs VI (B), VII,

VIII (d), and the Appendix of the Amended Final Judgment filed herewith. As to other respects, the motion to alter or amend is denied. It is so ordered. Exceptions are allowed.

Dated this 19th day of February, 1965.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America, Plaintiff, vs Morton Salt Company and Diamond Crystal Salt Company, Defendant	No. 4-61 Civ. 162 Clerk's Notice under Rule 77 (d) F.R. Civ. Pr. or, Rule 49 (c) F.R. Cr. Pr.

You are hereby notified that in the above-entitled cause, on the 19th day of February 1965 Judge Gunnar H. Nordbye filed Amended Final Judgment.

FRANK A. MASSEY, CLERK

/s/ By Hazel E. Gabrielson
Deputy

To:

John W. Neville
Jerome A. Hochberg
Department of Justice
Washington, D. C.

Miles W. Lord
U. S. Attorney
596 U. S. Courthouse
Minneapolis, Minn.

John G. Robertson
W-1781 First Natl. Bank Bldg.
St. Paul, Minn.

Robert E. Bowen
1630 Rand Tower
Minneapolis, Minn.

NOTE: If an appeal is contemplated the Rules of the United States Court of Appeals and "Suggestions to Attorneys concerning Appellate Rules and Practice," may be procured from the Clerk, U.S. Court of Appeals, U.S. Courthouse and Custom House, St. Louis, Missouri

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-61 Civ. 162

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MORTON SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,

Defendants.

AMENDED FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964, and the Court having filed its order amending the Final Judgment on February 19, 1965,

NOW, THEREFORE, it is hereby
ORDERED, ADJUDGED and DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II

As used in this Amended Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III

The provisions of this Amended Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their respective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Amended Final Judgment by personal service or otherwise, but shall not apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges applicable to rock salt, except with

(1) prospective purchasers in connection with bona fide purchases or sale negotiations or published offers to sell;

(2) carriers in connection with bona fide shipments; and

(3) warehousemen in connection with bona fide storage arrangements.

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII

The defendants Morton Salt Company and Diamond Crystal Salt Company are each directed and ordered for a period of three years after the date of the entry of this Amended Final Judgment to prepare monthly a sworn statement in the form set forth in the Appendix hereto attached in which it shall list each bid for rock salt submitted by it to a governmental body during the next preceding calendar month. Those sworn statements are to be submitted to the Department of Justice of the United States by such defendant on or before the last date of each calendar month during the three-year period commencing March 31, 1965. A duplicate of the sworn statement as to the bids listed thereon, together with the work papers used in the preparation of such bid shall be kept in the files of the de-

fendant for a period of three years from the date of the execution of such bids.

VIII

Nothing in this Amended Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America, or (d) prevent such defendants, or any of their respective subsidiaries, successors, assigns, officers, directors, agents, or employees, from participating in any *bona fide* distributorship or brokerage dealings or transactions not illegal under any of the antitrust laws of the United States.

IX

For the purpose of securing compliance with this Amended Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Salt Company or defendant Diamond Crystal Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the pos-

session or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Amended Final Judgment as from time to time may be necessary for the purpose of enforcement of this Amended Final Judgment.

X

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Amended Final Judgment in which the United States is a party or as otherwise required by law.

XI

Jurisdiction is retained for the purpose of enabling any of the parties to this Amended Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Amended Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this judgment are reserved.

Dated this 19th day of February, 1965.

BY THE COURT:

GUNNAR H. NORDBYE
Judge

APPENDIX

AFFIDAVIT

The undersigned, a principal officer of ..... (name of defendant), being first duly sworn, certifies to his best knowledge and belief that:

(1) Listed herein under Paragraph (2) hereof are all of the bids for the sale of rock salt submitted by ..... (name of defendant) to any governmental body during ..... (month and year) and that none of the bids listed were prepared by ..... (name of defendant) in collusion with any other seller of rock salt.

(2) List all bids, the name of recipient, and the date submitted during ..... (month and year):

.....

.....

.....

(3) The prices, terms or conditions of said bids were not submitted or made known by ..... (name of defendant) or by any employee or agent of .....

(name of defendant) to any other seller of rock salt prior to the official opening of said bids in violation of the Final Judgment in Court Action No. 4-61 Civil 162 entered by the United States District Court for the District of Minnesota, as amended on February 19, 1965.

.....
(Name of defendant)

By .....

Subscribed and sworn to before me this .. day of ....., 196..

.....
Notary Public
(State and County)

APPENDIX G

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C.

LETTER OF TRANSMITTAL

July 31, 1962

THE PRESIDENT,
THE PRESIDENT OF THE SENATE,
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

MY DEAR SIRS:

Executive Order 10936, Reports of Identical Bids, directs that from time to time the Attorney General shall issue a report consolidating the information he has received pursuant to the implementation of the Executive Order. Accordingly, I have the honor of transmitting herewith the first of these reports, compiled by the Antitrust Division, Department of Justice.

The Executive Order requires that the departments, agencies, and instrumentalities of the Federal Government shall report on a mandatory basis. The participation of State and local governments is requested on a voluntary basis. I am pleased to report that the response of the State and local governments has been enthusiastic.

Contained in this document are tabulations consolidating the data submitted in 599 reports of identical bidding received in the period July 15, 1961, to February 9, 1962. Special summary tables have been provided to point up those elements which appear significant.

Finally, I should make it clear to you that there are a number of reasons for the phenomenon of identical bids. These are analyzed in the report. The inclusion in the text tables of the names of firms which have submitted identical

bids does not imply that these firms have engaged in illegal or improper activities. The names are included for analytical and informational purposes only. If their inclusion contributes to public and business awareness and thus serves to discourage practices, however lawful, which result in identical bids, I believe the public interest would be well served thereby.

Respectfully,

ROBERT F. KENNEDY
Attorney General.

APPENDIX H

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C.

LETTER OF TRANSMITTAL

July 31, 1964

THE PRESIDENT,
THE PRESIDENT OF THE SENATE,
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

MY DEAR SIRS:

Section 7 of Executive Order 10936 directs the Attorney General to make a report to the President, from time to time, consolidating the information received pursuant to the Executive Order and to send copies of the report to the President of the Senate and the Speaker of the House of Representatives. I have the honor of transmitting herewith the second report issued in accordance with this section of the Executive Order.

The first report, which was filed July 31, 1962, covered less than seven months experience under the Executive Order. This report encompasses the twelve month period ending December 31, 1962 and is the first report to cover the experience of a full calendar year. It includes 2,550 reports filed by Federal, State and local governments; it reveals the details of the identical bidding affecting 3,329 line items of procurement; and it identifies the 3,032 firms which submitted identical bids to public agencies in calendar year 1962.

While identical bidding may constitute evidence of the existence of conspiracies to monopolize or to restrain trade or commerce, the inclusion in this report of the names of the firms which submitted identical bids does not imply

that these firms have thereby engaged in illegal or improper activities. Their names are included for analytical and informational purposes only. If their inclusion contributes to public and business awareness and thus serves to discourage practices, however lawful, which result in identical bids, I believe the public interest would be well served thereby.

Respectfully,

ROBERT F. KENNEDY
Attorney General.

APPENDIX I

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C.

LETTER OF TRANSMITTAL

February 1, 1965

THE PRESIDENT,
THE PRESIDENT OF THE SENATE,
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

MY DEAR SIRS:

Section 7 of Executive Order 10936 directs the Attorney General to make a report to the President, from time to time, consolidating the information received pursuant to the Executive Order and to send copies of the report to the President of the Senate and the Speaker of the House of Representatives. I have the honor of transmitting herewith the third report to be issued in accordance with this section of the Executive Order.

This report covers our experience in the calendar year ending December 31, 1963. It includes 1,675 reports filed by Federal, State and local governments; it reveals the details of the identical bidding affecting 2,504 line items of procurement; and it identifies each of the 2,503 firms which submitted identical bids to public agencies in 1963.

The inclusion in this report of the names of the firms which submitted identical bids does not imply that these firms have engaged in illegal or improper activities. However, identical bidding may constitute evidence of the existence of conspiracies to monopolize or to restrain trade or commerce. The names of the identical bidders are included as a contribution to public and business awareness and to discourage the practice. Identical bidding, however lawful,

tends to impair the effectiveness of public procurement under competitive bidding procedures since it subordinates the criterion of price to less economically significant considerations in making contract awards.

Respectfully,

NICHOLAS DEB. KATZENBACH
Acting Attorney General.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 276

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF DIAMOND CRYSTAL SALT COMPANY

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IN THE

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No.....

MORTON SALT COMPANY and DIAMOND CRYSTAL SALT COMPANY,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

JURISDICTIONAL STATEMENT OF DIAMOND CRYSTAL SALT COMPANY

Appellant Diamond Crystal Salt Company ("Diamond") appeals from the Amended Final Judgment of the United States District Court for the District of Minnesota, Fourth Division ("District Court"), holding that Diamond and Morton Salt Company ("Morton") "have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act", and submits this Jurisdictional Statement to show that the United States Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The Memorandum Decision (Appendix A) of the District Court dated August 6, 1964, is unreported.

JURISDICTION

This action was brought by the United States pursuant to Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 909, 15 USC 4, to enjoin an alleged violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1.

The Findings of Fact and Conclusions of Law (Appendix B) of the District Court were entered on November 24, 1964, as was its Final Judgment (Appendix C). Its Order amending that judgment (Appendix D) was entered on February 19, 1965, as was its Amended Final Judgment (Appendix E). Diamond's Notice of Appeal was filed on April 19, 1965, in the District Court.

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *Meat Drivers v. United States*, 371 U.S. 94.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person * * * shall * * * be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of * * * property, without due process of law; * * *"

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal * * *"

Section 4 of the Sherman Act, 26 Stat. 209, as amended, 36 Stat. 1167, 62 Stat. 909, 15 U.S.C. 4, provides in pertinent part:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title * * *."

QUESTIONS PRESENTED

1. Where the United States prosecutes a criminal antitrust suit which results in a jury verdict of not guilty, is the United States then barred from prosecuting a "civil" suit against the acquitted defendants involving the identical charge under the same statute (a) by the doctrine of *res judicata* (notwithstanding *United States v. Real Estate Boards*, 339 U.S. 485), or (b) by either the double jeopardy clause or the due process clause of the Fifth Amendment to the United States Constitution?

2. In view of the uncontroverted evidence showing that (a) no market existed for de-icing rock salt in the freight advantage area enjoyed by Diamond's South Louisiana mine, (b) the market for such homogeneous product nearest to Diamond's mine was the Midwest, (c) because such market was substantially more distant from Diamond's mine than from the mines of its competitors, Diamond could compete with them for the sale of de-icing rock salt to Midwest governmental agencies only by "absorbing" substantial amounts of freight, and (d) Diamond had access to abundant, current and legitimate information concerning the components of its competitors' bid prices,

(i) did Diamond violate Section 1 of the Sherman Act by adopting a policy of "meeting but not beating" its estimate of the lowest price to be bid to each such agency?

(ii) did the District Court err in holding that Diamond adopted such policy in concert with others?

STATEMENT

1. Diamond, Morton and International Salt Company ("International") were *acquitted* by the jury in a companion criminal suit (Criminal Action No. 4-61 Cr. 65, United States District Court for the District of Minnesota) instituted by the United States in which the Indictment was *identical*, except for appropriate changes in form, to the Complaint filed by the United States in this civil antitrust suit (App. 9a). This case was tried, pursuant to the stipulation of the parties, on the record made in such criminal case (as supplemented by Morton's and Diamond's answers to two interrogatories) so that the District Court, which did not try the criminal case, did not have the benefit of the "demeanor" evidence considered by the jury therein. Despite these facts, the District Court concluded in its Findings of Fact that Diamond and Morton, in concert with unnamed co-conspirators, violated Section 1 of the Sherman Act by adopting a policy of pricing de-icing rock salt "to the end that bidding on this commodity to be furnished to * * * government agencies * * * should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, 'meeting but not beating the price of a competitor.'" (Finding No. IV, 11a).

The Findings of Fact were "limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Diamond from 1957 to 1960 * * * made under sealed bids submitted to

one or more of" 16 specified Midwest governmental agencies (Finding No. I, 10a).

2. Prior to the date of the Memorandum Decision, only one related suit for treble damages pursuant to Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, had been instituted. Subsequent to such date, Morton, Diamond, International and other rock salt producers and distributors have been sued for treble damages in 21 suits filed in five districts by at least 600 governmental agencies (either as original plaintiffs, intervening plaintiffs or identified potential intervenors). Despite the jury acquittal in the criminal case, each treble damage plaintiff has asserted or implied that it is entitled to the benefit of Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, 15 U.S.C. 16(a).

3. The evidence established the following uncontradicted facts:

(a) Throughout the period covered by the Findings, 1957 to 1960, governmental agencies annually invited suppliers to submit sealed bids for the sale of de-icing rock salt on a delivered price, i.e., f.o.b. destination, basis (Tr. 236, 323, 475, 1650). Each invitation to bid specified the points of delivery as well as the alternative methods of delivery, e.g., rail or truck, and the quantity units, e.g., bulk or 100 lb. bags, upon which bids could be submitted. All bids were publicly opened and announced by the agency at a place and time specified in its invitation (Tr. 413, 572, 614, 701). After the bids were opened, the agency decided, as to each point of delivery, which type or types of bids it would accept. A separate award was then made for each destination to a supplier whose bid for each chosen type was or equalled the lowest submitted (Tr. 514-515, 575, 980, 1651). Although the successful bidder was obli-

gated to supply the agency's total requirements for the season, whatever they might prove to be, the agency was under no obligation to make even a minimum purchase (Tr. 479).

(b) Due to the great bulk and weight of rock salt, the cost of its transportation was a large percentage of its delivered price. Consequently, each producer had a distinct competitive advantage in the area surrounding its mine (DX-21, Tr. 1744).

(c) In January, 1957 Diamond acquired a rock salt mine in South Louisiana and thereby obtained for the first time a supply of de-icing rock salt (Tr. 1641). No market for de-icing rock salt existed in the freight advantage area surrounding Diamond's mine. The market nearest to Diamond's mine was the Midwest (Tr. 1644-5). At the time Diamond acquired its mine, International, from its mine in Detroit, and Morton, from its mine across the Detroit River in Ojibway, Ontario, sold at least 85% of the de-icing rock salt consumed in the Midwest (IX-11, MX-19). In most, if not all, of such market Diamond's rail transportation costs exceeded International's by a *minimum* of $2.00 per ton (DX-19). For example, in 1957 the rail cost from International's Detroit mine to Indianapolis was $6.40 per ton, while Diamond's rail cost to Indianapolis from South Louisiana was $9.80 per ton. Since the delivered price paid by Indianapolis in 1957 was $14.80 per ton, International's plant return (i.e., delivered price minus cost of transportation) on Indianapolis' purchases was $8.40 per ton. By contrast, on the same delivered price Diamond's plant return per ton would have been but $5.00 (DX-20).

(d) Diamond partially overcame its severe freight disadvantage by substantially expanding a new, less expensive method of transporting South Louisiana rock salt to

the Midwest, i.e., by barge up the Mississippi River and its tributaries to depots from which deliveries would be made by truck (DX-24, Tr. 1705, 1715). As a result, large quantities of South Louisiana de-icing rock salt competed *for the first time* in the Midwest against de-icing rock salt produced in the Detroit area (DX-25). Despite the economies of Diamond's barge-depot-truck delivery system, the ratio between its transportation costs to the Midwest and its plant return often approached (and even surpassed) 1 to 1 (Tr. 1650). Since Diamond's transportation costs to Midwest agencies continued to exceed those of the Detroit area producers, Diamond's plant return remained less than theirs (DX-24).

(e) The adoption of Diamond's barge-depot-truck delivery system by other suppliers caused marked *declines* in the delivered price of de-icing rock salt sold in the Midwest (DX-1, 5, 6). At the same time the use of depots and truck deliveries enabled Midwest agencies to order de-icing rock salt on days' shorter notice than had previously been possible when deliveries were made by rail from the mine (Tr. 1942).

(f) Diamond captured a significant share of the Midwest market from International, the dominant Detroit producer (Tr. 1056, DX-51).

(g) If Diamond's bids exceeded its competitors', it would receive no awards (Tr. 515, 703-704). If, on the other hand, Diamond obtained a significant award by undercutting its estimate of the lowest bid to be submitted by any of its competitors, the reduction would, upon the opening of such bid, become known to its competitors and would cause them to retaliate (Tr. 1678-1679). Diamond therefore concluded that if it regularly bid below its estimate of the lowest delivered price, its substantial freight disadvantage would ultimately force it to "absorb" so much freight (that is, to reduce its plant return to such an extent) as to eliminate

itself as a competitor in the Midwest (Tr. 1671). Therefore, Diamond adopted a policy of "meeting but not beating" the *estimated lowest* delivered price to be bid by any of its competitors to Midwest governmental agencies (Tr. 1673).[1]

(h) Diamond had access to a vast amount of current market information upon which to base its estimate of such lowest delivered price. In its Memorandum Decision the District Court acknowledged that the sources of such information were "legitimate" (App. 7a). They included bid opening reports which Diamond received in a continuous flow throughout each bidding season disclosing the prices currently being paid by Midwest agencies (DX-27), records reflecting the bids received by each such agency at its preceding bid openings (Tr. 1935), competitors' price bulletins obtained from Diamond's customers (Tr. 841), rail and truck tariffs approved by the Interstate Commerce Commission and state and local counterparts thereof (Tr. 634, 701, 1659), and invoices reflecting Diamond's purchases of rock salt (Tr. 1814).

(i) *Each* of Diamond's bids which was put into evidence by the United States was computed upon the basis of market information obtained from one or more of such legitimate sources (Tr. 1915).

(j) Despite the availability of this market information, Diamond matched the lowest delivered price in less than one-half of its bids (DX-29, 30, 31).

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[1] Even though Diamond matched its estimate of the lowest bid to be submitted to Milwaukee in 1961, Diamond's bid proved to be the lowest by $1.30 per ton (GX-102). On succeeding bids International and Morton retaliated by lowering their prices by at least $1.30 per ton below the prices they had submitted prior to Diamond's 1961 Milwaukee bid.

4. Diamond explicitly denied it participated in any manner in any price-fixing agreement or understanding (Tr. 918, 2046). The United States made no effort to rebut Diamond's unqualified testimony that, in recognition of its substantial freight disadvantage, Diamond unilaterally formulated its de-icing rock salt pricing policy (Tr. 1672).

5. In reaching its decision that Diamond adopted its de-icing rock salt pricing policy in concert with others, the District Court ignored the uncontroverted evidence that none of Diamond's discussions with competitors related to such policy.

THE QUESTIONS ARE SUBSTANTIAL

1. The first question presented by this Jurisdictional Statement is the same as the second question set forth in Morton's concurrently filed Jurisdictional Statement. Diamond hereby incorporates by reference that portion of Morton's Jurisdictional Statement which discusses such constitutional question, not because Diamond places less emphasis upon the novelty, importance and general applicability of such question, but only to avoid needless repetition of an argument upon which the position of the two companies is identical.

2. On Page 214 of the *Report of the Attorney General's National Committee to Study the Antitrust Laws* recognition is given to the basic and unalterable economic principle upon which Diamond's de-icing rock salt pricing policy was based:

> "The Committee believes that recognition of the complex role performed by geographic pricing in a national market is basic to any valid legal appraisal of delivered pricing. Particularly in the sale of basic homogeneous commodities, where transportation costs mount high and the buyer's susceptibility to advertising slogans and fancy wrappings run low, rivalry among suppliers must consider the substantial competitive advantages of proximity to the consuming market. To compete successfully for sales

> in a distant area, sellers must quote prices to prospective customers which *after* taking into account the elements of freight cannot exceed the offer of a more favorably situated rival."

On pages 215-6 of such Report the Committee expanded this thesis:

> "In the sale of basic homogeneous commodities, informed buyers will never pay more to one seller than to his rival for identical and standardized goods; some tendency toward price uniformity is hence inevitable, and may equally indicate effective competition and successful collusion."

Squarely presented by this appeal is the propriety of the pricing policy by which Diamond captured a significant percentage of the Midwest market for de-icing rock salt—a high transportation cost, homogenous commodity purchased by informed buyers—from International which theretofore had been faced with continuous competititon in such market only from Morton. The legality of Diamond's pricing policy of "meeting but not beating" the estimated lowest delivered price must necessarily be of significance to all basic commodity producers which seek to expand their markets into territories in which they are burdened by a freight disadvantage.

It would be unrealistic and economically unwise for a disadvantaged producer like Diamond to undercut deliberately the delivered prices quoted by its local competitors whose promixity to the market enables them to continue the price cutting cycle to a point which would make it impossible for the distant producer to remain in competition. Consequently, if a policy like Diamond's is, as asserted by the District Court, one of "not competing on prices" (Finding IV, App. 11a) and thus is inherently illegal, the likely

result will be the creation of a territorial monopoly for each producer within its own freight advantage area.[2]

The legal issue thus presented is whether the doctrine of conscious parallelism, as enunciated in *Theatre Enterprises v. Paramount,* 346 U.S. 537, permits a disfavored company like Diamond to match the estimated lowest delivered price in a distant market through utilization of legitimate information.

While the District Court stated in its Memorandum Decision that the doctrine of conscious parallelism was "particularly pertinent" in this case (App. 8a), such court nevertheless failed to apply the doctrine because it said there were "sufficient additional facts and circumstances" which convinced it that the United States had proved the existence of a price-fixing agreement "by the greater weight of all the evidence" (App. 8a).

Just what these "additional facts and circumstances" were, the District Court did not say. Nowhere does the Memorandum Decision (which comprised the District Court's *only* independent analysis since its substantive Findings of Fact and Conclusion of Law were adopted almost verbatim from proposals submitted by the United States) point to evidence showing that Diamond did other than what it said it did, i.e., independently adopt its policy

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[2] In view of the fact that Diamond's plant return on its sales to Midwest governmental agencies was substantially less than that of its competitors (e.g., $5.00 per ton vs. $8.40 per ton on Indianapolis' 1957 purchases, page 6 *supra*), it can only be concluded that the District Court was so mesmerized by the receipt of identical bids that it ignored, not only the fact that substantial price declines occurred during the Indictment period as the result of Diamond's entry into that market, but also that, from Diamond's point of view, price competition was indeed keen since Diamond was willing to accept substantially *less* for an identical product than were its rivals.

to "meet but not beat" the estimated lowest bid. True enough, the Memorandum Decision recites that the United States *claims* that Diamond adopted its policy in concert with others, and the Findings of Fact, the work product of the United States,[3] refer to telephone calls and to meetings which took place "in Minnesota, Illinois, Michigan and elsewhere" (Finding No. VII, App. 12a). But nowhere does the Memorandum Decision or the Findings of Fact reflect that the evidence is *undisputed* that most of those meetings and telephone calls did not even include Diamond and that Diamond *never* discussed its de-icing rock salt pricing policy with any competitor.

If, in fact, an agreement involving Diamond to adopt a "formula" for pricing de-icing rock salt was spawned at meetings or by telephone conversations, Diamond's reliance upon *Theatre Enterprises* is misplaced. However, since Diamond's testimony is unrebutted that its pricing policy was not discussed with any competitor, the District Court, in order to hold as it did, necessarily had to disbelieve Diamond's witnesses whom, unlike the jury in the companion criminal case, it did not see.[4]

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[3] In *United States v. El Paso Gas Company*, 376 U.S. 651, this Court commented unfavorably upon findings of fact which were "not the product of the workings of the district judge's mind". In so doing it quoted, obviously with approval, the recent statement of Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* (1963), p. 166, that findings prepared by counsel "won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case."

[4] Rule 52(a), F.R.C.P., as interpreted by Judge Frank in *Orvis v. Higgins*, 180 F. 2d 537 (C. A. 2), in the light of this Court's decision in *United States v. Gypsum Co.*, 333 U.S. 364, directs the appellate court to apply the "clearly erroneous" standard in a manner which is consistent with the nature of the evidence before the trial court. Where the findings are based, as in the case at bar, on written evidence

(Continued on next page)

The Memorandum Decision of the District Court fails to disclose the underlying basis for its holding as to Diamond. It thereby left unanswered this vital question: did the District Court hold Diamond guilty because, without more, it unilaterally adopted and pursued a pricing policy that such court considered to be contrary to the public interest, or was the decision based upon credible evidence which persuaded the District Court that Diamond had in fact entered into an agreement to adopt that policy.

This distinction was pinpointed by Judge Medina in *United States v. Morgan*, 118 F. Supp. 621 (DC.SD.N.Y.), at page 634:

> "What the Sherman Act does is to declare illegal 'every contract, combination * * * or conspiracy' in restraint of trade or commerce * * *. The task of the judge is to determine whether the conduct challenged in the litigation contravenes the prohibitions of the staute. This is no mandate to the judiciary to decide anti-trust cases according to individual ideas of expediency, which may change according to the personal philosophy or even the po-

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(Continued from preceding page)
alone, Judge Frank recognizes that the appellate court is "as able as he [the trial judge] to determine credibility, and so we may disregard his finding". A different construction of Rule 52(a) was espoused by Judge Clark in *Heim v. Universal Pictures Co.*, 154 F. 2d 480, 491. Professor Moore commends the Frank view, 5 Moore, *Federal Practice*, §52.04.

Diamond submits that the Frank view should apply here, particularly since the District Court's Findings of Fact were the work product of the United States and thus "do not reveal the discerning line for decision of the basic issue in the case." *United States v. El Paso Gas Company, supra*, 651.

In any event, the decision of the District Court was "clearly erroneous" since consciously parallel behavior—here, submission of identical bids, is insufficient to sustain the plaintiff's burden of proof (*Theatre Enterprises v. Paramount, supra*) and since there was no "demeanor" evidence on which the District Court could disbelieve Diamond's uncontroverted testimony that it unilaterally adopted its de-icing rock salt pricing policy. Cf., *Dyer v. MacDougall*, 201 F. 2d 265, 269 (C. A. 2).

litical affiliation of the judge. It is the combination or joint action of the many which is the essence of the offense. Unless there is some agreement, combination or conspiracy the Sherman Act is not applicable.

"But it is suppposed by some that the requirement of combination is a mere empty phrase to which one must indeed do lip-service, but which may easily be got around by finding agreement, combination or conspiracy, when in truth and in fact no agreement, combination or conspiracy exists, provided the result obtained seems desirable and in the public interest. This is not the law but only another aspect of the false but seductive doctrine that the end justifies the means which, so far as I know, has never taken lodgment in American jurisprudence; and I hope it never will.

"True it is that conspiracies whether by business men or others engaged in unlawful schemes are often hard to detect. No direct proof of agreement between the wrongdoers is necessary; circumstantial evidence of the illegal combination is here as elsewhere often most convincing and satisfactory. But, when all is said and done, it is the true and ultimate fact which must prevail. Either there is some agreement, combination or conspiracy or there is not. The answer must not be found in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case which must be carefully sifted, weighted and considered in its every aspect. This is an ardous but necessary task."

Perhaps the utter failure of the Findings of Fact, prepared as they were by the United States, to link Diamond's de-icing rock salt pricing policy to the telephone calls and meetings to which they refer in general terms only can be

explained by the willingness of the United States to pay "lip-service" to the requirements of the Sherman Act in its zeal to condemn identical bids as such.[5] This explanation does not, however, excuse the District Court from performing the "arduous but necessary task" of sifting, weighing and considering the evidence relating to Diamond "in its every aspect" to discover, not whether it approved of Diamond's de-icing rock salt pricing policy, but whether such policy was adopted by agreement with Diamond's competitors.

Absent the Expediting Act, Diamond would be entitled to an automatic and full appellate review of its contention that the District Court ignored the evidence relating to Diamond, i.e., its freight disadvantage which *compelled* the adoption of its de-icing rock salt pricing policy, the abundance of legitimate market information which made such policy workable, the absence of proof that Diamond discussed its pricing policy with competitors, the marked *decrease* in the price of de-icing rock salt which resulted from Diamond's barge-depot-truck delivery system, and the relatively low percentage of its identical bids.

By virtue of the Expediting Act, only this Court can afford the complete review to which Diamond would other-

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[5] In his letter dated July 31, 1962, transmitting the Report on Identical Bidding in Public Procurement, Attorney General Robert F. Kennedy said:

"Finally, I should make it clear to you that there are a number of reasons for the phenomenon of identical bids. These are analyzed in the report. The inclusion in the text tables of the names of firms which have submitted identical bids does not imply that these firms have engaged in illegal or improper activities. The names are included for analytical and informational purposes only. *If their inclusion contributes to public and business awareness and thus serves to discourage practices, however lawful, which result in identical bids, I believe the public interest would be well served thereby.*" (Emphasis supplied.)

wise be entitled. If such review is denied, the inherent legitimacy of Diamond's de-icing rock salt pricing policy—and thus the legitimacy of similar policies adopted by disfavored producers in many basic commodity industries—will remain unsettled. Also perpetuated will be the "false but seductive" doctrine condemned by Judge Medina in *United States v. Morgan, supra,* that the end espoused by the United States—here, the cessation of identical bids—justifies the means—disregard for the requirement in Section 1 of the Sherman Act of an agreement.

CONCLUSION

Diamond's appeal presents substantial questions of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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FRED W. FREEMAN,
GEORGE B. MARTIN,
Of Counsel.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

MORTON SALT COMPANY and
DIAMOND CRYSTAL SALT COMPANY,
Defendants.

No. 4-61 Civ. 162

MEMORANDUM DECISION

This cause comes before the Court on a stipulation filed November 4, 1963, whereby the issues herein are submitted on the record in a criminal proceeding between the same parties.

Defendants are charged with violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, the pertinent portion of which reads:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

The complaint alleges a conspiracy to fix the prices of rock salt. The issues herein are limited to sales to public authorities under sealed bids. The defendants in this civil proceeding are Morton Salt Company and Diamond Crystal Salt Company. Originally, Carey Salt Company and International Salt Company were parties, but consent decrees have been entered as to them. The co-conspirators not named as parties herein with which the evidence is

concerned primarily are Cutler-Magner Company, of Duluth, Minnesota, a distributor for Morton Salt Company, and Cargill Corporation, of Minneapolis, Minnesota, a distributor for Diamond Crystal Salt Company. The governmental agencies concerned are located in the States of Minnesota, Wisconsin, Michigan, Illinois, Ohio and Indiana. In these areas, the parties share some 85 to 95 per cent of the rock salt business. The annual sales to governmental agencies are admittedly substantial.

It is the plaintiff's contention that the record herein amply substantiates a finding that, during the period from 1956 to 1960, these defendants, with others involved acting in concert, adopted a policy of restrictive pricing of rock salt to the end that separate bidding on this commodity to be furnished to the various governmental agencies in the area involved should produce identical prices. This plan, according to the plaintiff, was carried out primarily by a so-called formula price fixing; that is, the defendants maintained arbitrary f.o.b. mine prices which bore no relation to their costs of production, overhead, or anticipated profits; that a method or plan was devised by the conspirators whereby each of the defendants, according to a prearranged plan or understanding in preparing bids to a particular governmental ageney, would first determine in order to meet the competitive price of the other competitors, the latter's f.o.b. prices. The f.o.b. prices were maintained, according to the plaintiff, at a high enough level to protect the pricing policy of the defendant suppliers, and directed to constitute a means whereby each of the rock salt suppliers in the industry would be better enabled to meet the bidding price of any particular supplier. In addition, plaintiff contends that a defendant bidder would in most instances include the rail freight rates of its competitor or competitors even though the shipment was to be made by water or by truck, knowing that to be the method which would be employed by its competitors in determining their bidding prices. In other words, plaintiff contends that if A is to bid against B, A will attempt to frame its bid on B's f.o.b. mine price and freight rates,

whether artificial or not, in attemtping to compute a competitor's delivered price, and with the designed purpose of meeting, that is to match and not beat the bidding price of its competitor or competitors. Plaintiff recognizes that, in addition, there is a practice among the defendants to obtain post-bidding information of their competitors. These practices, however, according to plaintiff, are all designed to carry out an understanding as to uniform bid prices among the suppliers of rock salt even though their purpose and intent may not always be attained. In other words, plaintiff contends that there was a concerted plan among the defendants to meet the price of all competition in all bidding so far as that plan could be accomplished. Plaintiff contends that its position as to the plan and practice followed by the industry in this regard is not only directly sustained by the evidence, including the meetings of the parties with each other to achieve this end, but that the record reflects what it terms a monotonous identity of the bids among the defendants. For instance, plaintiff points out that to the State of Minnesota in 1956, Morton, Cutler-Magner and International bid identically on some 67 locations. In 1957, to this State, the same bidders were identical on 57 locations. In 1958, to Minnesota, Cutler-Magner, International and Cargill were identical at 68 out of 69 delivered locations, and on a re-bid they were identical 53 times. In 1959, Cutler-Magner, International and Cargill participated in four separate invitations to bid to Minnesota, and on some 273 occasions the bids were from 95 to 100 per cent identical. In 1960, to the same State, Cutler-Magner International and Cargill were identical on 135 different bids involving truck and railroad bag deliveries, and on some 41 bids during that year, Cutler-Magner and Cargill were identical 90 per cent of the time. And to the City of Minneapolis during a period from 1957 to 1960, the Morton or Cutler-Magner or Cargill bids with International 47 times on bulk truck, bulk pick-up, bag truck or bag pick-up bids were identical. Diamond, however, submitted no bids to Minnesota municipalities during the period in question.

The record of Morton and International with Cutler or Cargill in bids to the State of Wisconsin in 1956, 1957, 1958 and 1959 reflects a percentage of identical bidding which varies from 94 to 100 per cent. In bids to the City of Milwaukee, Wisconsin, Morton and International were identical from 1956 to 1960. A similar record as to Morton and International was reflected in bidding to the City of Detroit, Michigan, the State of Ohio and the State of Ohio Turnpike Commission. Diamond, however, in 1958 as to Wisconsin area destinations was non-identical in 41 out of 62 bids, and in 1959 there was non-identity in 52 out of 72 of its Wisconsin bids, and on re-bid for that year Diamond was completely non-identical. In 1960 Diamond's bid to the State of Wisconsin was 94.4 per cent identical in 67 out of 71 bids, and 100 per cent identical in four bids with Morton and International to the City of Milwaukee. However, in 1960, as to Wayne County Road Commission of Michigan, Diamond was 100 per cent in identity as a bidder in some 17 bids with Morton and International. As to Illinois bidding in the year 1957, Diamond, International and Cargill, out of 181 bids, were identical in 165, or 91.2 per cent, and in 1959, in bag railroad and bulk railroad, Morton, Diamond and International in some 45 bids were 100 per cent identical, and in 1960, 90 per cent identical. These Illinois bids were made to the State of Illinois Highway Division. In bids to the State of Illinois Toll Road Commission, Diamond, Morton, International and Cargill were 100 per cent identical in the year 1960 in some 16 bids. In Ohio in the years 1958 to 1960, Diamond's record as to identity of bids carried from 94.3 to 100 per cent in identity.*

The position of the defendants may be summarized as follows: Rock salt is a homogeneous substance which for the purpose of de-icing is of the same quality regardless of the producer. It is bought strictly on the basis of price. According to the defendants, business experience has fully

*The above recited statistical data as to the results of bidding do not assume to include a summary of the entire record with respect thereto, but it is fairly representative and the percentages quoted are substantially correct.

established the necessity of attempting to have uniformity in bids made to governmental agencies. Uniformity in bidding is therefore attempted to be attained by an examination of prior bids of competitors and an independent analysis is made by each of the defendants in framing bids in an attempt to meet the bids of competitors so as to avoid the debacle in the rock salt market if price cutting were entered upon. Thus, it is argued that, although there is an individual attempt to attain uniformity in the bids made to the various governmental agencies, this attempted result is not due to any concert of action or understanding among the defendants but represents the individual exercise of common business prudence. According to the defendants, the identity of bids which the Government stresses as evidence of conspiracy to fix prices is due to four principal factors: (1) The factor growing into the makeup of most bids, i.e., the f.o.b. mine price and the common knowledge of freight rates; (2) prior bids of competitors to any governmental agencies in any State are made known and made use of in framing the next year's bids by competitive bidders; (3) additional competitive information is attained by each of the defendants obtaining public data disclosed at the opening of bids; and (4) the number of major companies producing rock salt is sufficiently small so that the bidding practices may be analyzed and followed by the others. Thus, it is urged by the defendants that the Government's attempt to deduce collaboration from mere identity of bids is completely frustrated by the record herein. It is the position of the defendants that the identity of bids stems from the attempt to adopt and match bids of competitors with the defendants acting individually in the best interests of their companies. Each of the defendants points out that the mere individual following of a competitor's announced price is not illegal even if it is carried out with the intent of achieving identical prices. Self interest, it is argued, dominates the interest of each defendant in its individual attempt to match a competitive price and not a conspiracy or understanding among the defendants, as the Government charges. In addition, the defendants argue that the express denials of collusion by the officials of the defend-

ants fully negatives the assumption which the Government assumes to deduce from parallelism in prices. And the defendants vigorously emphasize the evidence of aggressive competition among the defendants, at least at certain periods during the existence of the alleged conspiracy.

At the outset, it must be recognized that identical bids do not necessarily indicate that they emanate from collusion or conspiracy on the part of the defendants to fix prices. Moreover, ruinous competition among the producers of rock salt may well spell disaster to the entire industry. On the other hand, if there is a conspiracy to fix prices in violation of the law, defendants may not justify their action by the contention or defense that they were motivated to enter into it in order to avoid ruinous competition. It is difficult to analyze this entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny without concluding that this anomalous result was obtained in no other manner than by an adherence to a plan adopted by consultation and conferences among the parties involved. That the plan did not at all times prove effective and that there were sporadic departures therefrom is readily apparent. But equally so are the incidents as to conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties.

In finding that the plaintiff has established by a fair preponderance of the evidence that there was an agreement among these defendants to meet the bid prices of the various rock salt bidders who filed written bids with governmental agencies during the period in question and in the geographical area referred to, the Court is entirely mindful that at times when it seemed to suit their purpose, these companies have taken independent action by way of bid prices. Moreover, Morton Salt Company obtained a controlling interest in certain Canadian companies in order to compete with International, which resulted in a marked increase in the business of Morton and to the detriment of the business of International. There is evidence that during the period covered by the complaint, not only was

Diamond merely partly successful in meeting bid prices of its competitors, but that it adopted new techniques in the distribution of rock salt whereby Diamond and its distributor, Cargill, markedly increased their sales to the diminution of sales by some of the other defendant competitors. Admittedly, these circumstances may seem inconsistent with the position of the Government with reference to the alleged understanding to avoid competition in the bid prices of rock salt. But, on the other hand, it is not the position of the plaintiff that the understanding and plans of the parties at all times operated with complete efficiency. The defendants agree that they did attempt *individually* to meet the bid price of other competitors in order to avoid a spiral of prices downward which allegedly would have been ruinous to the industry. The fact that there were, during the period in question, instances of aggressive competition and strategy in attemtping to build up the individual business position by one or more of the defendants does not negative the affirmative evidence that during the period in question there was in effect among the defendants a concerted plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the governmental agencies in the areas involved. Price fixing practices by a concert of action which are condemned by the law are not freed from the law's impact merely because the plan at times broke down by the competitive acts of the so-called mavericks in the industry, or that there was not uniformity at all times in the carrying out of the plan. Moreover, even legitimate sources of information as to previous bids or computation of bids to meet a competitor's bid which are made on factors well known to all in the industry, if gathered and obtained in pursuance of a plan and understanding between and among the parties that the prices of rock salt should be uniform, may be considered as activities in furtherance of an illegal conspiracy.

In making the foregoing observations, this Court has fully recognized the principle that defendants emphasize,

to wit, that an agreement is a *sine qua non* of a price conspiracy and that the language of the Supreme Court in *Theatre Enterprises v. Paramount Film Dist. Corp.*, 346 U.S. 537 (1954), at pp. 540-41, is particularly pertinent here:

> "* * * To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. * * * But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."

However, we do not only have circumstantial evidence of consciously parallel behavior, but sufficient additional facts and circumstances which amply justify the Court in concluding that by the greater weight of all the evidence the plaintiff has sustained the burden of proof which the law imposes upon it.

Plaintiff may, on September 14, 1964, at ten o'clock A.M., upon appropriate notice, present proposed findings of fact and conclusions of law and order for judgment consistent herewith. Exceptions will be reserved to the defendants.

Dated this 6th day of August, 1964.

By the Court:
Gunnar H. Nordbye
Judge

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint in this case, which was filed on July 11, 1961, alleges a conspiracy to fix the prices of rock salt. Except for the prayer for relief and other appropriate changes in form therein, the complaint is identical to an indictment filed June 28, 1961, in Criminal Action No. 4-61 Cr. 65, against Morton Salt Company ("Morton"), International Salt Company ("International"), Diamond Crystal Salt Company ("Diamond"), and Carey Salt Company ("Carey"). Prior to the trial of said criminal action, Carey pleaded *nolo contendere* and concurrently therewith a consent judgment was entered against Carey in this civil case. On June 7, 1962, after a trial which commenced on May 2, 1962, Morton, International and Diamond were acquitted of the charge set forth in the indictment by the jury impaneled in said criminal action. On November 4, 1963, a consent judgment was entered against International in this case. Pursuant to a "Stipulation Re Trial of Case on Record," filed November 4, 1963, plaintiff, Morton and Diamond agreed that this case be tried on the record made in said criminal action, as supplemented by plaintiff's interrogatories 1 and 2 filed in this case, Morton's answers thereto, and Diamond's answers thereto, as amended. The initial briefs of the plaintiff and of each defendant were concurrently filed on or about December 2, 1963, and their responsive briefs were concurrently filed on or about December 23, 1963. This Court's Memorandum Decision was filed on August 6, 1964.

FINDINGS OF FACT

I.

The following Findings of Fact are limited to sales of de-icing rock salt by Morton from 1956 to 1960, by Diamond from 1957 to 1960, and by other co-conspirators during that period, made under sealed bids submitted to one or more of the following government agencies: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike.

II.

Rock salt is the term applied to solid sodium chloride and its impurities as it is found in nature. It is mined in five principal sections of the United States, namely Louisiana, Kansas Michigan, Ohio and New York. Defendants ship rock salt in interstate commerce.

The location of the mines which were the principal sources of rock salt sold to government agencies in the Six-State Midwest Area during all or part of the years 1956-60 are as follows:

Detroit, Michigan—International;

Ojibway, Ontario, Canada—Morton;

Fairport, Ohio—Morton;

Jefferson Island, Louisiana—Diamond;

Goderich, Ontario, Canada—Sifto Salt Limited, from which Diamond purchased rock salt for resale in the United States during 1960;

Hutchinson, Kansas—Carey;

Kanapolis, Kansas—Independent Salt Company;

Lyons, Kansas—American Salt Company.

Until January, 1957, Diamond did not produce rock salt and did not sell rock salt to government agencies. At that time it acquired Jefferson Island Salt Company whose only rock salt mine is located at Jefferson Island, Louisiana.

III.

International, Morton and Diamond among them share 85-90% of the rock salt market nationwide. This degree of control is present specifically in the Six-State Midwest Area, i.e., Minnesota, Wisconsin, Michigan, Illinois, Ohio, and Indiana, the subject of concentrated proof at trial.

IV.

Defendants, with co-conspirators, in concert, adopted a policy of restrictive pricing of rock salt to the end that bidding on this commodity to be furnished to the various governmental agencies with which the conspirators did business should produce identical prices. The policy, in application, consisted simply and avowedly of not competing on prices, or otherwise stated, "meeting but not beating the price of a competitor."

V.

The policy was carried out in the main by a system of formula pricing consciously adhered to by the conspirators, relying primarily on the following:

(a) The conspirators, by concert of action, would use the same f.o.b. mine prices in computing delivered prices.

(b) The f.o.b. mine prices so used bore no relation to the conspirators' costs of production, overhead, or

anticipated profits, but were maintained at a high enough level to protect the pricing policy and better enable the conspirators to meet one another's prices.

(c) The conspirators, by concert of action, would use artificial freight rates in computing delivered prices.

VI.

Concert of action among the conspirators was achieved by the conspirators maintaining among themselves a system of intelligence, the specific purpose of which was to assure adherence to formula and arrive at identical prices to public authorities.

VII.

The system of intelligence was maintained by telephone calls and by meetings held periodically among the conspirators. The calls and meetings were among officers of the conspirators at the higher echelons. Meetings took place in Minnesota, Illinois, Michigan and elsewhere.

VIII.

The effect of the conspiracy on public authorities was to cause bids to said public authorities for de-icing salt, including the sixteen mentioned specifically in the Government's proofs as indicative of bids made by the conspirators to public authorities generally, to be identical to a substantial and in many instances to an extraordinary degree, thereby depriving said public authorities of the advantage of competitive bidding.

IX.

Plaintiff has sustained its burden of proof not only by evidence of consciously parallel behavior but also by abundant positive evidence of outright collaboration establishing the existence of agreement and understanding among the parties.

X.

The fact that there were instances of aggressive competition and strategy in attempting to build up the individual business position by one or more of the defendants, or the fact that there were breakdowns or interruptions in the uniformity of price patterns caused by so-called "mavericks" or otherwise, does not negative the preponderantly affirmative evidence established by the record as a whole that there was in effect among the conspirators a concerted and continuing plan and effort founded upon an understanding and agreement among the parties that there should be, and was, as far as possible, a fixing of uniform prices in the bidding prices for rock salt to the government agencies with which the conspirators did business.

Upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The defendants are and have been engaged in trade and commerce among the several States in the sale of rock salt. The Court has jurisdiction of the parties and the cause of action herein.

2. The defendants Morton Salt Company and the Diamond Crystal Salt Company have combined and conspired

to fix prices in the sale of rock salt in violation of Section 1 of the Sherman Act as charged in the complaint.

3. A final judgment consistent herewith will be entered.

Exceptions are reserved.

Dated this 24 day of November, 1964.

By the Court:
Gunnar H. Nordbye, Judge.

APPENDIX C

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964,

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I.

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II.

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III.

The provisions of this Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their respective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges except with prospective purchasers in connection with bona fide purchase or sale negotiations or published offers to sell;

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each ordered and directed, for a period of three years after the date of entry of this Final Judgment, to submit a sworn statement in the form set forth in appendix hereto, with each bid for rock salt submitted to any governmental body, such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid; and a duplicate of each such sworn statement and of

such bid, together with the work papers used in the preparation of such bid shall be kept in the files of the defendants for a period of three years from the date of execution of such bids.

VIII.

Nothing in this Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America.

IX.

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Sale Company or defendant Diamond Crystal Salt Company made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

X.

No information obtained by the means permitted in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this decree are reserved.

Dated this 24th day of November, 1964.

By the Court:
Gunnar H. Nordbye,
Judge.

APPENDIX

AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to.....
(name of recipient of bid) dated.....
has not been prepared by.....
(name of defendant) in collusion with any other seller of rock salt, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of.....
(name of defendant), to any other seller of rock salt and will not be communicated to any such seller,

in violation of the Final Judgment in Civil No. 4-61 Civ. 162 entered by the United States District Court for the District of Minnesota on November 24, 1964.

Dated:....., 196

.....
Signature of person responsible for the preparation of the bid.

.....
Signature of offieer.

APPENDIX D

ORDER

The defendants have made a motion to alter or amend the Final Judgment herein entered on November 24, 1964.

After due consideration, the motion to alter or amend is granted to the extent reflected in Paragraphs VI (B), VII, VIII (d), and the Appendix of the Amended Final Judgment filed herewith. As to other respects, the motion to alter or amend is denied. It is so ordered. Exceptions are allowed.

Dated this 19th day of February, 1965.

By the Court:
Gunnar H. Nordbye, Judge.

APPENDIX E

AMENDED FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 11, 1961, the defendants Morton Salt Company and Diamond Crystal Salt Company having appeared and filed their respective answers to the complaint, and trial of this cause having been held in accordance with the stipulation assented to by attorneys for

said parties signed by the Court and filed on November 4, 1963, and the Court having on August 6, 1964, issued a Memorandum Decision directing the submission of a decree in accordance therewith and the Court having filed its Findings of Fact and Conclusions of Law on November 24, 1964, and the Court having filed its order amending the Final Judgment on February 19, 1965.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I.

This Court has jurisdiction of the subject matter hereof and of said parties hereto. The complaint states a claim upon which relief may be granted against the defendants Morton Salt Company and Diamond Crystal Salt Company under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and defendants Morton Salt Company and Diamond Crystal Salt Company have combined and conspired to fix prices of rock salt in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act.

II.

As used in this Amended Final Judgment:

(A) "Person" means any individual, partnership, firm, association, corporation, or legal or governmental entity;

(B) "Rock salt" means a common salt (sodium chloride) occurring in solid form as a mineral.

III.

The provisions of this Amended Final Judgment applicable to the defendants Morton Salt Company and Diamond Crystal Salt Company shall also apply to their re-

spective subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendants who shall have received actual notice of this Amended Final Judgment by personal service or otherwise, but shall not apply to transactions solely between a defendant and its officers, directors, agents, employees, parent company and subsidiaries, or any of them, when acting in such capacity.

IV.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any other person to:

(A) Establish, maintain, stablize or fix prices, pricing methods or any other terms or conditions for any sale to any third person;

(B) Submit collusive or rigged bids or quotations to any third person.

V.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program with any seller of rock salt to:

(A) Bid or quote, refrain from bidding or quoting or communicate an intention to bid or quote on any rock salt to be sold to any third person; or

(B) Hinder, restrict, limit or prevent any person from selling rock salt to, or purchasing rock salt from, any third person.

VI.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of rock salt the quotation or charging of any price or other term or condition of sale for rock salt;

(B) Communicating to or exchanging with any person any information relative to prices, pricing methods or transportation charges applicable to rock salt, except with

(1) prospective purchasers in connection with bona fide purchases or sale negotiations or published offers to sell;

(2) carriers in connection with bona fide shipments; and

(3) warehousemen in connection with bona fide storage arrangements.

(C) Disclosing to or exchanging with any seller of rock salt the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

(D) Selling rock salt to any reseller thereof on a commission basis.

VII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are each directed and ordered for a period of three years after the date of the entry of this Amended Final Judgment to prepare monthly a sworn statement in the form set forth in the Appendix hereto attached in which it shall list each bid for rock salt submitted by it to a governmental body during the next pre-

ceding calendar month. These sworn statements are to be submitted to the Department of Justice of the United States by such defendant on or before the last date of each calendar month during the three-year period commencing March 31, 1965. A duplicate of the sworn statement as to the bids listed thereon, together with the work papers used in the preparation of such bid shall be kept in the files of the defendant for a period of three years from the date of the execution of such bids.

VIII.

Nothing in this Amended Final Judgment shall be deemed to (a) prevent the defendants Morton Salt Company and Diamond Crystal Salt Company from individually or jointly with others presenting their views to appropriate regulatory agencies with respect to import tariffs or taxes upon or transportation charges for rock salt, or (b) prevent such defendants from exercising any rights they may have under the Act of Congress of 1937, commonly called the Miller-Tydings Act, as amended, or (c) require that such defendants act in violation of any law or regulation of the United States of America, or (d) prevent such defendants, or any of their respective subsidiaries, successors, assigns, officers, directors, agents, or employees, from participating in any *bona fide* distributorship or brokerage dealings or transactions not illegal under any of the antitrust laws of the United States.

IX.

For the purpose of securing compliance with this Amended Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendant Morton Salt Company or defendant Diamond Crystal Salt Company made to its principal

office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendants shall submit such written reports with respect to any of the matters contained in this Amended Final Judgment as from time to time may be necessary for the purpose of enforcement of this Amended Final Judgment.

X.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Amended Final Judgment in which the United States is a party or as otherwise required by law.

XI.

Jurisdiction is retained for the purpose of enabling any of the parties to this Amended Final Judgment to apply to this Court at any time for such further orders and direc-

tions as may be necessary or appropriate for the construction or carrying out of this Amended Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

XII.

The defendants Morton Salt Company and Diamond Crystal Salt Company are hereby ordered to pay all costs to be taxed in this case.

Exceptions to this judgment are reserved.

Dated this 19th day of February, 1965.

By the Court:
Gunnar H. Nordbye, Judge.

APPENDIX

AFFIDAVIT

The undersigned, a principal officer of..... (name of defendant), being first duly sworn, certifies to his best knowledge and belief that:

(1) Listed herein under Paragraph (2) hereof are all of the bids for the sale of rock salt submitted by .....:...(name of defendant) to any governmental body during.....(month and year) and that none of the bids listed were prepared by.....(name of defendant) in collusion with any other seller of rock salt.

(2) List of bids, the name of recipient, and the date submitted during.....(month and year):

.....
.....
.....

(3) The prices, terms or conditions of said bids were not submitted or made known by..... (name of defendant) or by any employee or agent of .....(name of defendant) to any other seller of rock salt prior to the official opening of said bids in violation of the Final Judgment in Court Action No. 4-61 Civil 162 entered by the United States District Court for the District of Minnesota, as amended on February 19, 1965.

.....
(Name of defendant)

By .....

Subscribed and sworn to before me this — day of ....., 196—.

.....
Notary Public
(State and County)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 275

MORTON SALT COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

No. 276

DIAMOND CRYSTAL SALT COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal in a civil action in which the district court held that appellants Morton Salt Company ("Morton") and Diamond Crystal Salt Company ("Diamond") violated Section 1 of the

785-076--65

Sherman Act, 15 U.S.C. 1, by fixing the price of rock salt sold to public authorities under sealed bids (M. J.S. A–1—A–17).[1] Defendants were enjoined from fixing prices or exchanging the kind of information that had been instrumental in effectuating the price-fixing conspiracy (M. J.S. A–18—A–23).

1. THE HISTORY OF THE LITIGATION

This civil case was brought as a companion proceeding to a criminal action charging the same offense (M. J.S. A–12). In both cases the defendants were International Salt Co. ("International"), Morton, Diamond and Carey Salt Company ("Carey") (M. J.S. A–4, A–12—A–13). International, Morton and Diamond are, respectively, the first, second and third largest producers of rock salt in the United States (Tr. 1004), and they account for 85 to 90 percent of the national and midwestern rock salt markets (M. J.S. A–14—A–15). Carey is a producer of rock salt with mines in the Kansas producing field (M. J.S. A–14). Named as co-conspirators but not as defendants in both cases were (1) Cutler-Magner Company ("Cutler"), of Duluth, Minnesota, an independent distributor for Morton; and (2) Cargill Corporation ("Cargill") of Minneapolis, Minnesota, an independent distributor for Diamond (M. J.S. A–4). In the criminal case Carey pleaded *nolo contendere,* and the other

[1] "M. J.S." refers to the jurisdictional statement filed by Morton. "D. J.S." refers to Diamond's jurisdictional statement. "Tr." refers to the transcript of testimony in an earlier criminal case, adopted as the record in the present case by stipulation.

defendants were acquitted by a jury (M. J.S. A–12). In the civil case a consent decree was entered against both Carey and International, leaving the case to be tried only as to Morton and Diamond (M. J.S. A–12—A–13). The parties agreed to submit the case to the trial court on the record made at the criminal trial, together with two interrogatories and defendants' responses thereto (M. J.S. A–13).

2. THE FACTS

Rock salt is mined in five principal sections of the country—Louisiana, Kansas, Michigan, Ohio and New York (M. J.S. A–14)—and sold to government authorities principally for use as a deicing agent in removing snow and ice from roads and highways (Tr. 628–629). Sales to such authorities are generally made under sealed bids (Tr. 629). The purpose of the sealed-bid procedure is to secure the price advantages of competitive bidding, wherein the lowest bidder receives the award (Tr. 202–204, 293). The salt is delivered in bulk or bags, and is transported by railroad, truck, barge and boat.

Appellants' pricing policy, which each claimed to have adopted and followed independently of the other, is to "meet but not beat" competitors' prices (M. J.S. A–15, Tr. 2821–24, 3108–09, 2825–26, D. J.S. 10, M. J.S. 7; M. J.S. A–7–8, A–10). In its simplest form, this policy is implemented by quoting the f.o.b. mine price of the producer closest to the consumer plus the cost of delivery by rail from that producer (Tr. 753–754, 629, 643, 680, 1814–17, 1848–49, 1852, 1987). The producers farther from the purchaser—such as Dia-

mond, whose Louisiana mines are farther from the midwestern market than International's mine in Detroit, Michigan, or Morton's in Ojibway, Canada—absorb a part of their actual freight cost (Tr. 1651–53, 3011, M. J.S. 18). Sometimes the parties arrived at identical prices by employing rail freight rates in computing transportation cost even though the rock salt was actually shipped by truck, barge or boat (*e.g.*, Tr. 3022–39, 1030–36, 1082–93; M. J.S. A–15, where the finding refers to "artificial freight rates"), and in such instances the parties on occasion added a "truck premium" to the rail rate used in the formula (*e.g.*, Tr. 1082–89, 2464). There were also numerous telephone calls and personal meetings at which high executives exchanged general pricing information and information about specific bids (*e.g.*, Tr. 681, 689–90, 731–32, 795, 784–785, 1184, 1740, 1319–23, 1381–84, 1244–45, 1420–23, 1312–15, 1385–90, 1405–13, 1565–67, 1423–46, M. J.S. A–9, A–16).

3. THE DECISION OF THE DISTRICT COURT

The district court held that the government had proved an agreement to fix prices (M. J.S. A–11, A–16). It expressly acknowledged that identical bids do not necessarily prove conspiracy (M. J.S. A–11, A–9), but found in accordance with *Theatre Enterprises* v. *Paramount,* 346 U.S. 537, 540–541, that the "entire record as to collaboration among the parties and with the multitude of complete identities in the bids to the very penny" demonstrated "adherence to a plan adopted by consultation and conferences among the parties involved" (M. J.S. A–9).

It rejected the contention that any inference of violation was negated by the fact that, at times, appellants actively competed for business, finding that instances of competition did not negative the affirmative evidence that the parties agreed to fix the price of rock salt to the maximum extent that it was possible to do so (M. J.S. A–10, A–16—A–17).

ARGUMENT

The district court correctly decided this case on the basis of established antitrust principles which have been repeatedly affirmed by this Court. The case presents no issue warranting plenary consideration, and the judgment of the district court should be affirmed.

1. Appellants argue that this case raises the question whether mere "conscious parallelism" violates the antitrust laws (M. J.S. 10–19; D. J.S. 9–16). No such question is in fact presented. The district court expressly stated that the facts showed "adherence to a plan adopted by consultation and conferences," including "conferences in meetings, by telephone, and otherwise, which were carried on by the parties in order to restore the understanding among the parties" (M. J.S. A–9). It deemed the rule of *Theatre Enterprises* v. *Paramount,* 346 U.S. 537, on which appellants rely, "particularly pertinent," and expressly found that the government had proved the "agreement [which] is a *sine qua non* of a price conspiracy" (M. J.S. A–11).

The district court's finding of conspiracy and collusion rested, we submit, upon ample evidence.

Against a highly suggestive background consisting of a "multitude of complete identities in the bids to the very penny" (M. J.S. A–9), including instances in which the added factor for rail freight was arbitrary because actual deliveries were made by truck, boat or barge (*supra,* p. 4), the proof showed telephone conversations and meetings among various employees of the companies involved at which they admittedly passed along information as to previous and future bids (*supra,* p. 4), and meetings at which prices were actually fixed. One such meeting (Tr. 1405–13, 1565–68), held at the Minneapolis Athletic Club in 1957, was attended by La Liberte, the President of Cutler, a Mr. Bergford of Cutler, Beattie, Morton's Special Assistant to the Vice President in Charge of Marketing, and Tonnemaker, Manager of Cargill's Salt Department. Beattie explained that prices on a pending invitation to bid for State of Wisconsin requirements were to be arrived at through the use of the normal pricing methods (Tr. 1409), and he showed previously prepared worksheets to Tonnemaker, who wrote down the delivered prices for locations with which he was concerned and later bid these prices. His bids were identical to Morton's—and also to International's (Tr. 1413, 1566–67). Indeed, Tonnemaker testified that "[i]f the people in the meeting had thought we were going to bid lower they wouldn't have given me the information. I felt it was fairly evident by virtue of my being there that we were going to bid the same price" (Tr. 1567).

On another occasion (Tr. 1425–46), Beattie told Tonnemaker that the latter would be called by Cutler (Tr.

1428). La Liberte of Cutler then called Tonnemaker to give him the pricing bases to be used in bidding to supply State of Indiana requirements. Tonnemaker wrote down this information and used it in preparing his bids. The night before the bidding opened, Mr. Smith, Manager of Diamond's Sales Service Department, called Tonnemaker because he was quite anxious to give pricing information to Tonnemaker.[2] The pricing information which Smith related was the same information that Tonnemaker had already received from La Liberte. The next day Tonnemaker bid according to the pricing bases received from La Liberte and Smith, except for two locations on which he cut the price. With the exception of these two locations, Tonnemaker's bids were the same as Morton's and International's (Tr. 1441–42).

As the foregoing examples illustrate, there was ample support for the district court's conclusion that this was a case not of mere "conscious parallelism," but of agreement to fix prices. Defendants sought to explain away the evidence; but the district court was free to reject their explanations. Since the court's findings were not clearly erroneous (Rule 52(a), Fed. Rules of Civ. Proc.), as appellants virtually concede

[2] The evidence also showed, among other things, that Smith of Diamond constantly discussed future bids with the Sales Operation Manager of Carey Salt (Tr. 795); that executives of Diamond and Cargill fixed the amount of the truck premium charged the State of Illinois in 1957 (Tr. 1386–90); and that, in accordance with a general understanding that Cutler would adopt Morton's prices (Tr. 1245), these two companies regularly conducted a complete interchange of information for the purpose of arriving at identical bids (Tr. 1279–80).

(D. J.S. 12, fn. 4; M. J.S. 17–18), its decision must stand. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394–95.[3]

2. Appellants argue that by virtue of the principle of *res judicata* and the Fifth Amendment's prohibition against double jeopardy, their acquittal by a jury in a prior criminal proceeding barred the present suit for injunction. There is no merit to this argument. This Court rejected the same *res judicata* argument in *United States* v. *Real Estate Boards*, 339 U.S. 485, where it expressly distinguished *Coffey* v. *United States*, 116 U.S. 436, the case upon which appellants rely. Appellants so acknowledge (M.J.S. 20; *id.*, fn. 8), and suggest no reason why this Court should reexamine its decision in *Real Estate Boards*. That case correctly held that Congress having provided the United States with both a penal and a civil remedy in antitrust cases, a jury's refusal to find guilt beyond a reasonable doubt in a criminal case does not foreclose a court from issuing an injunction in a civil

[3] Appellant Diamond suggests that this Court should apply a lesser standard to the findings of the court below because that court (1) did not hear the witnesses for the defense and therefore could not appraise their credibility (D.J.S. 12 and fn. 4), and (2) adopted the government's proposed findings rather than drafting its own *de novo* (D.J.S. 12 and fn 3, 14–16). As to (1), the appellants misread *Gypsum*, *supra*, which expresses a preference for contemporaneous writings over oral testimony but does not suggest that the "clearly erroneous" rule would not apply to a cause submitted on a written record by stipulation of the parties. As to (2), Judge Nordbye adopted the government's findings only after writing an opinion which clearly stated the basis of his decision, and after hearing defendants' objections to the government's proposed findings (Transcript of hearing of October 28, 1964, pp. 1–83).

suit, whose purpose is remedial, not punitive, and in which a lesser standard of proof is therefore appropriate.

Appellants' double jeopardy argument, in part based on the premise that this civil injunctive suit amounts to a second punitive action because it may open the way for treble damage actions by private parties, also is without merit. It is well established, first, that the purpose of civil antitrust suits such as this one, and the relief obtainable in them, are remedial, not punitive, *Real Estate Boards, supra,* at 493; *United States* v. *National Lead Co.,* 332 U.S. 319, 338, and, second, that a remedial civil action is not barred by the Fifth Amendment's prohibition against double jeopardy, *Helvering* v. *Mitchell,* 303 U.S. 391. That a subsequent treble damage action might be facilitated by findings made in the government's civil action does not change the essential character of the government suit.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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Attorneys.

AUGUST 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

IN THE

Supreme Court of the United States

No. 276

DIAMOND CRYSTAL SALT COMPANY,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

BRIEF OF DIAMOND CRYSTAL SALT COMPANY OPPOSING MOTION TO AFFIRM

At pages 3-4 of its Motion to Affirm the United States concedes that, due to the unfavorable location of Diamond's Louisiana mine, Diamond must "absorb a part of [its] actual freight cost" in making sales of de-icing rock salt to Midwest governmental agencies. This concession substantiates the primary factual premise underlying the second question presented in Diamond's Jurisdictional Statement, i.e., by virtue of the disadvantageous location of its Louisiana rock salt mine, Diamond had no alternative but

to attempt to "meet but not beat" the anticipated lowest bid.

Nonetheless, the United States contends that such question does not deserve plenary consideration by this Court. Its only argument in support of such contention, i.e., ample evidence exists to sustain the District Court's finding that Diamond agreed to adopt a restrictive de-icing rock salt pricing policy in concert with its competitors, is both specious and misleading.

First, the United States implies that Diamond's pricing policy is somehow "artificial" or "arbitrary" because Diamond on occasion employed "rail freight rates in computing transportation cost even though the rock salt was actually shipped by truck, barge or boat. * * " (pp. 4 and 6, Motion to Affirm).

The fact is that the practice of computing bids for truck deliveries by adding a so-called "truck premium" to the rail rate was initiated by the State of Illinois. In 1957 Illinois announced that it would give no consideration to bids for truck delivered rock salt "where the price per ton F.O.B. truck at destination is more than $1.50 per ton in excess of the price per ton F.O.B. rail cars to the same destination" (Tr. 1817-18). Obviously, this instruction forced suppliers to compute their truck bids on the basis of rail rates to which an increment, or premium, not exceeding the specified maximum could be added.

The use of a truck premium results in substantial savings to the purchaser because the supplier's actual cost of truck deliveries exceeds the rail rate plus the premium (Tr. 3046-3048). Once Illinois required suppliers to absorb such portion of their actual truck cost, the truck premium became widely utilized in computing truck delivered bids

(Tr. 2460). As competition forced reductions in the amount of the premium from $1.50 per ton to $1.00 per ton (Tr. 2340) and even less (Tr. 1881-82), the savings accruing to purchasers increased proportionally.

Moreover, if, as a condition to submitting a bid for truck deliveries, Diamond is required to truck its product the entire distance from Louisiana to the Midwest, Diamond would, due to the prohibitive truck rates that apply to such hauls, be forced to withdraw from competition therein. Stated differently, even though, to meet the anticipated lowest delivered price, Diamond's bids are on occasion computed on the basis of the actual truck rate from the closest competitive mine to the point of delivery, Diamond must utilize lower cost barge transportation from Louisiana to river ports within economical trucking distance of the ultimate point of delivery in order to net back at its Louisiana mine a return on its rock salt which exceeds its cost of production.

Therefore, unless the Government advocates a state of competition in which a supplier is required to realize the same f.o.b. mine return on all of its sales (which is only another way of arguing that freight absorption is unlawful), it is in no position to argue that Diamond's truck delivered bids to Midwest governmental agencies are "artificially" or "arbitrarily" computed.

In addition to the "artificial freight rate" argument the Motion to Affirm discusses in some detail three transcript references in support of its charge that Diamond participated in a price-fixing agreement: two involved conversations solely between Diamond and Cargill, Diamond's distributor; the third involved conversations that were not concerned with rock salt.

A. With respect to the Indiana conversation (p. 7, Motion to Affirm), the evidence is undisputed that the Manager of Diamond's Sales Service Department (who had no authority to approve a bid (Tr. 2100-02)) did nothing more than make a resale price suggestion to Diamond's distributor Cargill. Not only was such suggestion admittedly rejected in large part by Diamond's distributor, but that distributor—whose officials comprised the Government's key witnesses—repeatedly and unconditionally testified that throughout the indictment period Cargill independently developed its own pricing policy and unilaterally determined the amount of its bids (Tr. 1340, 1483).

B. With respect to the other Cargill conversation (Footnote 2, Motion to Affirm), the testimony of Cargill's Tonnemaker on pages 1388-99 of the Transcript and Diamond's Exhibit 10 make it clear that Diamond and its distributor submitted a joint truck bid to Illinois in 1957 because Cargill, which had a supply of rock salt in Illinois, was not a "known name" at that time and Diamond, whose name was "familiar", had no supply of rock salt there (Tr. 1388-89). How such joint bid from Diamond and its distributor, neither of whom could individually submit a truck bid to Illinois, tends to prove that Diamond adopted its de-icing rock salt pricing policy in concert with its competitors, the Government does not and cannot explain.

C. The Government would have this Court believe that the testimony to which it refers in Footnote 2 of its Motion to Affirm is that "Smith of Diamond constantly discussed future bids with the Sales Operation Manager of Cary Salt (Tr. 795)". This characterization does gross violence to the testimony appearing at page 795 of the Transcript. Moreover, the concluding statement of the Cary Salt witness is that his conversations with Diamond did not relate

to rock salt (Tr. 796), the only product involved in this action (Finding No. I; DJS 10a).

As the United States must concede, the Transcript is absolutely devoid of any evidence that Diamond *knew of, or participated in,* the incidents involving Cargill, Morton and Cutler-Magner, Morton's distributor, which are discussed at pages 6 and 7 of the Motion to Affirm.

Except as above noted, the Motion to Dismiss does not specifically analyze the Transcript as it relates to Diamond, even though the Government received one 30 day extension and, without permission, took an additional 3 days in which to file such Motion. Instead, the Government is content to make certain general references to the Transcript, many of which do not involve Diamond. Detailed analyses of those references which do pertain to Diamond would not only unduly lengthen this Brief but would serve no useful purpose since, to the extent they have not already been specifically discussed in this Brief or in Diamond's Jurisdictional Statement, they largely corroborate what has heretofore been said, namely, that Cargill's witnesses testified that Cargill ignored Diamond's resale price suggestions although the same were solicited by Cargill in its capacity as Diamond's distributor and that, due to the disfavored location of Diamond's mine, Diamond feared that lower delivered prices initiated by Diamond or Cargill would, through retaliation by International and Morton, force withdrawal of Diamond and Cargill from the Midwest snow and ice market.

CONCLUSION

The concession contained in the Motion to Affirm that Diamond is required to absorb freight in making sales of de-icing rock salt to Midwest governmental agencies, when coupled with the speciousness of the Government's "artificial freight rate" argument and its unsupported assertions that Diamond agreed with its competitors to adopt its de-icing rock salt pricing policy, strengthens Diamond's contention that the second question raised by its appeal is substantial and of public importance. Probable jurisdiction of that question, as well as of the question jointly raised by Diamond and Morton, should be noted.

Respectfully submitted,

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September 8, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 275

MORTON SALT COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA FOURTH DIVISION

BRIEF OF MORTON SALT COMPANY IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 275

MORTON SALT COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA FOURTH DIVISION

BRIEF OF MORTON SALT COMPANY IN OPPOSITION TO MOTION TO AFFIRM

The Government's motion to affirm should be denied for three reasons. First, the motion was not filed in compliance with the Rules of this Court. Second, unless the motion is denied, appellant will be deprived of any meaningful review of the District Court's decision. Third, the motion fails to show that this appeal does not raise substantial questions which deserve the attention of this Court.

I. The Motion Was Not Filed in Compliance With the Rules of this Court

On July 21, 1965, the last day on which the Government could file a motion to affirm pursuant to Rule 16 of the Rules of this Court, Mr. Justice White granted the Government's application for an extension of time. Counsel for Morton Salt Company ("Morton") was contacted on July 19 as regards such an extension and indicated no opposition.

The extension granted by Mr. Justice White was to and including August 20.

The Government's motion was filed on August 23, three days late. No contact was made with Morton's counsel as regards a further extension. No further extension was granted by this Court.

Rule 34.2 provides that the Clerk "will refuse to receive any application for extension" sought to be presented after expiration of the period sought to be extended. *A fortiori,* the Clerk should refuse to receive a motion not timely filed. Since the motion was not filed in compliance with the Rules of this Court, the motion should be denied.

II. A Grant of the Motion Would Deprive Morton of Any Review of the District Court's Decision

By virtue of the Expediting Act, 23 Stat. 823, as amended, 15 U.S.C. § 29, Morton did not have the opportunity to obtain a review of the District Court's decision by a court of appeals. Its one and only right to appeal was to this Court. The objective of that statute, i.e., the speedy disposition of appeals in civil antitrust cases brought by the Government, is completely thwarted if such disposition is made without any meaningful review.

The failure of Congress to amend the Expediting Act so as to provide for intermediate review is perhaps unfortunate, but litigants should not be deprived of any right to review because of Congressional inaction. We agree with the view expressed earlier this year by the dissenting Justices in *Kennecott Copper Corp.* v. *United States*:

> "So long as this statute remains on the books and Congress provides no intermediate review, see *United States* v. *Singer Mfg. Co.,* 374 U.S. 174, 175, it is our view that the policy of the Act is, in general, best served by plenary rather than summary dispositions of such appeals." 85 S. Ct. 1575 (1965)

In *Singer,* this Court expressly recognized the deprivation inherent in summary affirmance:

> "We noted probable jurisdiction in light of the fact that unless we did so the parties would be deprived of any appellate review in the case." 374 U.S. at 175 (1963)

The deprivation inherent in summary disposition of Expediting Act appeals is serious in any case but is doubly so here because of the Government's defeat in the companion criminal case which was tried on the same record. After dispositions on the merits of these two companion cases the parties stand in a draw. The jury, which saw and heard all the witnesses, found appellants not guilty; the District Court, which saw and heard none of the witnesses, held against the appellants on the same evidence.[1] Under such circumstances a meaningful review by at least one appellate tribunal—and this Court is the only forum available to appellant—is essential.

The importance of review in this case is underscored by the fact that the District Court's decision completely nullified the jury's not guilty verdict for all practical purposes. Notwithstanding the prior acquittal, the District Court's decision has spawned an avalanche of treble damage suits, in each of which the plaintiffs have indicated that they intend to rely on the adverse holding of the court below. A grant of the Government's motion would thus deprive Morton of the opportunity to demonstrate the error in the

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1. As pointed out in Morton's Jurisdictional Statement (p. 22), the conflicting conclusions reached by the jury and the court below are *possibly* explained on the basis of a difference in burden of proof, but there is no indication whatever that the jury's not guilty verdict would have been otherwise had the jury been instructed in terms of "preponderance of the evidence" rather than "reasonable doubt".

District Court's decision, not only for purposes of defeating the injunction entered against Morton, but also for purposes of canceling the adverse effect which such decision may have as regards the multi-million dollar treble damage claims by hundreds of claimants now pending in five district courts against Morton and other companies in the salt industry.

III. The Motion Fails to Show that the Questions Presented are Manifestly Unsubstantial

The motion to affirm does not meet the requirements of Rule 16.1(c) and fails to address itself to the issues underlying the two questions raised on this appeal, all of which are issues of substantial importance which should be resolved by this Court.

A. Question No. 1

In the space of three pages (Motion to Affirm, pp. 5-7) the Government purports to demonstrate to this Court that there is, in the 3,700-page record of the trial, "ample evidence" to support the District Court's finding of conspiracy. As regards Morton, evidence of two instances of pre-bid communications are described in an attempt to create the impression that such evidence is typical of the entire record and is sufficient to support the finding of the court below. A proper appraisal of these two incidents can be made only in light of the following facts:

1. The two bids involved in these incidents are the only bids, out of the 128 made during the five-year period involved in the trial, where there is any evidence of a pre-bid communication from Morton to any competitor.

2. In both instances the only Morton employee involved in any of the communications was a regional

sales manager having no pricing authority whatsoever. (Tr. pp. 2953-54 and p. 3019)

3. Cargill was the only competitor of Morton with whom the sales manager communicated concerning either of such bids.

4. The absence of any price-fixing agreement between Morton and Cargill was affirmatively proved by the following evidence as to Cargill's conduct and by the Government's concession that Cargill was not a conspirator:

(a) During the entire period covered by the complaint Cargill was following an independent pricing policy which regularly entailed Cargill's underbidding its competitors on most large bids, including the 1959 bid to Indiana. (Tr. pp. 1314-15, p. 1483, p. 1409, p. 1529, pp. 1536-37, pp. 1442-43, pp. 1553-54 and pp. 3068-70)

(b) Cargill's witnesses specifically denied entering into any price agreement as regards these two bids. (Tr. p. 1529)

(c) Apart from its practice of underbidding its competitors, Cargill's conduct toward the defendants affirmatively shows it was not a conspirator. (Tr. pp. 1505-11, pp. 1558-59, p. 888, p. 1326 and pp. 1563-64)

(d) Not surprisingly, the Government throughout the case (see Morton's "post-trial" reply brief, pp. 14-16) took the position that Cargill, the "maverick", was on the outside of the alleged conspiracy;

> "From the beginning Cargill was a maverick. Its concept of competing for the trade was to cut prices. (Tr. 1307)." (Government's initial "post-trial" brief, p. 8)

The lack of merit in the Government's motion to affirm, especially as regards its principal argument relating to

the above two incidents, is apparent when viewed in light of the District Court's findings. First, there is no finding with respect to either of these two specific incidents. Second, there is no finding that *any* bid submitted either to the State of Wisconsin or the State of Indiana was conspiratorial; there is, in fact, no finding that any conspiratorial bid was submitted to any particular one of the sixteen government agencies involved in the case. Third, and of paramount importance, there is no finding of any conspiracy between Morton and Cargill, or, for that matter, between Morton and any other competitor, *the District Court never having identified the co-conspirators with whom Morton was supposed to have conspired.*

The Government's motion fails to meet the principal issues raised under Question No. 1. The motion does not disclose whether the Government agrees with the present Attorney General of the United States and his predecessor (see Morton's J. S., pp. 10-12) that identical bidding is, in and of itself, an economic evil, to discourage which ("however lawful" such practice may be) the resources of the Federal Government can or should be brought to bear. Nor does the motion indicate whether there is agreement with the Government's constantly reiterated position in this case (see Morton's J. S., pp. 12-14), i.e., that a pricing *policy* to attempt to meet a predicted low bid is, in and of itself, illegal. This appeal thus presents to this Court a question of fundamental importance to the enforcement of Section 1 of the Sherman Act, a question which, until now, was thought by most antitrust lawyers to have been resolved by the *Theatre Enterprises* decision, namely, whether an agreement (express or implied and however proved) is an indispensable element of an illegal price conspiracy.

B. Question No. 2

The second question presented on this appeal goes to the right of the Government to re-prosecute a defendant in a "civil" antitrust case after having been defeated in a previous attempt to prove the identical charge in a criminal case. Appellants[2] contend that both the doctrine of *res judicata* and the protections afforded by the Fifth Amendment prohibit such a double prosecution. The Government disagrees but its motion to affirm does not meet the issues raised in Morton's Jurisdictional Statement.

1. In the discussion of *res judicata,* appellants suggested that this Court, after a reexamination of its decision in *Real Estate Boards,* return to the principle enunciated in *Coffey,* i.e., where "the fact or act has been put in issue and determined against the United States", there can be no relitigation of the issue regardless of possible differences in applicable burdens of proof. The Government makes no response to the three reasons cited by appellants for a re-examination of *Real Estate Boards.* No response is made to appellants' argument (Morton's J. S., p. 21, n. 8) that *Real Estate Boards* is in conflict with *Coffey,* in that the basis for this Court's distinguishing of the *Coffey* case in *Real Estate Boards* was unsound. No response is made to appellants' argument (Morton's J. S., p. 22) that the applicability of a *res judicata* defense should not be dependent on *mere possibilities* as to the rationale of a jury's not guilty verdict. No response is made to the observation (Morton's J. S., p. 22) that *fairness considerations* dictate that the rule of the *Coffey* case should prevail over that of *Real Estate Boards.*

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2. The plural is used because Diamond Crystal Salt Company, separately appealing to this Court in No. 276, has adopted *in toto* the argument presented under Question No. 2 herein and in Morton's Jurisdictional Statement.

Rather than respond to such issues, the Government weakly asserts that appellants "suggest no reason" for a reexamination of *Real Estate Boards*. Although their development must await the opportunity afforded by plenary review, the reasons for such reexamination have been clearly suggested, and the Government has simply chosen to ignore them. The failure to respond can mean only that the Government was unable to formulate a persuasive defense of *Real Estate Boards*.

2. Similarly, the Government's approach to the Fifth Amendment question presented by appellants is one of avoiding the issues. Appellants pointed out (Morton's J. S., p. 23) that, in *1958 Plymouth*, decided last term, this Court, electing to disregard technical procedural distinctions when determining the applicability of Constitutional protections, held that a civil forfeiture action was "quasi-criminal" for Constitutional purposes. The Government made no response to the asserted significance of this Court's recent decision.

Appellants cited two reasons why Government injunction actions should also be characterized as punitive or quasi-criminal. The first was that the Government must prove a crime in order to prevail in such an action. As no response was made to this observation, it must be assumed that the Government agrees with the authorities cited by appellants for this proposition of law.

The second reason cited by appellants is only obliquely answered by the Government in its motion to affirm. The Government does not attempt to deny that treble damage actions are punitive. And, although the Government expressly concedes only that its injunction actions "open the way" and "facilitate" treble damage actions, the Government does not deny that the avowed policy of the Department of Justice is to affirmatively *assist* treble damage

plaintiffs by instituting injunction actions. Nevertheless, simply by citing the *Real Estate Boards* and *National Lead* decisions, the Government maintains that the purpose of such suits is "remedial".

The Government's argument ignores the fact that both *Real Estate Boards* (1950) and *National Lead* (1947) were decided prior to this Court's acknowledgment (Morton's J. S., p. 28) in *Glenshaw Glass* (1955) that treble damage actions are punitive. The argument also ignores the fact that these cases were decided prior to the expressed adoption by the Department of Justice of its policy of affirmatively aiding treble damage plaintiffs. The argument further ignores the impact of *1958 Plymouth*, where this Court characterized a civil forfeiture proceeding as "quasi-criminal", in part because the forfeiture proceeding (involving property valued at only $1,000) required, as here, "the determination that the criminal law has been violated." Whether injunction actions under Section 4 of the Sherman Act should be characterized as quasi-criminal for purposes of prohibiting re-prosecution of antitrust charges by the Government is a question that should be resolved by the Court after plenary consideration of the issues.

CONCLUSION

For the foregoing reasons, the motion to affirm should be denied. Probable jurisdiction of the questions presented on this appeal should be noted.

Respectfully submitted,

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